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Applying principles of administrative law to investor-state treaty arbitrations

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Cesar R. Mata-Garcia

2012

University of Dundee

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# **APPLYING PRINCIPLES OF ADMINISTRATIVE LAW TO INVESTOR-STATE TREATY ARBITRATIONS**

By

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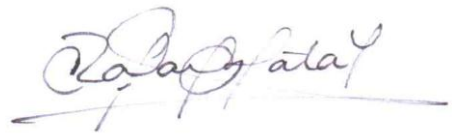
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## **STATEMENT OF ORIGINALITY**

I hereby state that I am the Author of this thesis. Unless otherwise indicated, I declare that I have consulted all references cited, and that I have performed the work for which this thesis is the result.

A handwritten signature in blue ink, appearing to read 'César R. Mata García', with a long horizontal flourish extending to the right.

César R. Mata García

November 2012

## **DEDICATION**

To  
My beloved country,  
Venezuela

## **ABSTRACT**

The aim of this research is to assess an emerging public-law concern: the review of the administrative actions of a host state in investment arbitration. This research examines the extent to which the principles of domestic administrative law can be used as a legal reference for investment arbitrators to address and resolve the legal issues presented in regulatory disputes that are resolved by means of investor-state treaty arbitrations (ISTAs). In arriving at an answer to this particular question, two factors are considered: (i) the use of administrative law principles as a part of the unitised nature of the law that governs the ‘state of law’ of any democratic society; and (ii) the current crisis of legitimacy that the investor-state treaty arbitration system is facing.

The thesis begins with a comparative analysis of the French and British administrative legal systems as representatives of the two most important legal traditions of the Western world (civil law and common law, respectively). This comparison identifies the common institutions and principles that are domestically used by host states to determine the legal and regulatory relationship between private actors and their public administrations (i.e., the state). It continues with conceptual and critical assessments of international investment treaties (IITs) and ISTAs, respectively, and identifies and analyzes the legal principles that have been developed in the international arena and have been used to settle international (regulatory) disputes between host states and private investors/actors.

Additionally, this thesis continues with an arbitral practice review to identify the factual statements that arbitral tribunals have included in their arbitral awards and which can be framed within the scope of the main principles of administrative law previously identified. This is achieved by taking into consideration one of the main features of the current investor-state arbitration system which is the use of this mechanism to settle regulatory disputes at an international level. This latter feature is considered to be (i) analogous to domestic administrative adjudication that provides (ii) legal mechanisms to resolve regulatory disputes between host states and private individuals when (iii) the public authority of the host state is compromised. Finally, this thesis reflects upon the current investor-state arbitration system and identifies the current political, international and academic concerns that are affecting the legitimacy of this arbitral system.

Given the analogy between the public law functions of the ISTA mechanism and the domestic administrative review mechanisms, both parallel levels of state regulatory review have been designed to protect private individuals from the unlawful or arbitrary conduct of the (host) state. The investment arbitration system has been designed as a temporary forum to provide private individuals with a special tool to challenge the domestic rights and privileges of the host state at the international level. This particular point shows, amongst other aspects, that investment arbitrators are arbitrators of law rather than arbitrators of equity since they are mainly required to assess the domestic regulation of the host state in accordance with the international standards of treatment

contained in an IIT and in accordance with the applicable law chosen by the IIT's contracting parties in order to determine the state's international responsibility.

This study finds that neither Bilateral Investment Treaties (BITs), the International Centre for Settlement of Investment Disputes (ICSID) nor the Arbitration Rules of the United Nations Commission on International Trade Law (UNCINTRAL) impedes or prevents investment arbitrators from applying some principles of domestic (administrative) law to ISTAs when domestic regulatory issues are at stake. A guideline as to what domestic (administrative) law principles should be applied to international regulatory investor-state disputes in conjunction with some international investment obligations has not been adequately studied in international law. Hence, the application of these principles to international regulatory disputes has been left to the discretion of investment arbitrators.

Finally, due to the current concerns and questions surrounding the current arbitral system, it could be affirmed that now is the right time to initiate the practice of referring to these domestic (administrative) law principles in international regulatory disputes. Conversely, the reluctance of investment arbitrators to refer to this particular source of law can be regarded, in the long-term, as a contribution to the current crisis of legitimacy that the international investment arbitration system is facing.

## LIST OF ABBREVIATIONS

AAA	American Arbitration Association
ABA	Azurix Buenos Aires, S.A. (Argentina)
ADR	Alternative Methods of Dispute Resolution
AGOSBA	Administración General de Obras Sanitarias de la Provincia de Buenos Aires (Argentina)
AUCOVEN	Autopista Concesionada de Venezuela, C.A.
BANOBRAS	Banco Nacional de Obras y Servicios Públicos S.N.C. (México)
BIT	Bilateral Investment Agreement
BITs	Bilateral Investment Agreements
BRVC	Bolivarian Republic of Venezuelan Constitution
CEPMLP	Centre for Energy Petroleum and Mineral Law and Policy
CONITE	Comisión Nacional de Inversiones y Tecnologías Extranjeras (Perú)
COTERIN	Confinamiento Técnico de Residuos Industriales, S.A.
DPCT	Dirección Provincial de Catastro Territorial (Argentina)
EC	European Community
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EDM	Entertainments de México. S.A. de C.V.
EGOTH	Egyptian Organization for Tourism and Hotels
EP	European Parliament
EU	European Union
FCN Treaty	Friendship Commerce and Navigation Treaty
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIC	Foreign Investment Commission (Chile)
FIO	Foreign Investment Ombudsman
FTA	Free Trade Agreement
FTC	Free Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HELNAN	Helnan International Hotels A/S
ICC	International Chamber of Commerce

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Arbitration
IAs	International Investment Arbitrations
IIT	International Investment Treaty
IITs	International Investment Treaties
ILC	International Law Commission
IMF	International Monetary Fund
INE	Instituto Nacional de Ecología (México)
IOCs	International Oil Companies
IPA	Investment Promotion Agency
ISTA	Investor-State Treaty Arbitration
ISTAs	Investor-State Treaty Arbitrations
IT	Investment Treaty
ITA	Investment Treaty Arbitration
ITAs	Investment Treaty Arbitrations
ITO	International Trade Organization
ITs	Investment Treaties
LPPLC	Law to Promote and to Protect the exercise of the Free Competition (Venezuela)
MERCOSUR	Mercado Común del Cono Sur
MFN	Most Favoured Nation
MIA	Multilateral Investment Agreement
MIGA	Multilateral Investment Guarantee Agency
MINVU	Ministry of Housing and Urban Development (Chile)
MOSP	Ministry of Public Works (Argentina)
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NOCs	National Oil Companies
NPM	Non-Precluded Measures
NT	National Treatment
NYC	New York Convention
OECD	Organization for Economic Co-operation and Development
OEPC	Occidental Exploration and Production Company
OPEC	Organization of Petroleum Exporting Countries
OPIC	Overseas Private Investment Corporation
ORAB	Organismo Regulador de Aguas Bonaerense

OSINERGMIN	Organismo Supervisor de la Inversión en Energía y Minería (Perú)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PDVSA	Petróleos de Venezuela, S.A.
PEQUIVEN	Petroquímica de Venezuela
PMRS	Plano Regulador Metropolitano de Santiago (Chile)
POES	Programa de Optimización y Expansión del Servicio (Argentina)
RPI	Real Price Index
SCC	Stockholm Chamber of Commerce
SEGOB	Secretaría de Gobierno (México)
SEREMI	Secretario Regional Ministerial (Chile)
SLP	Mexican State of San Luis Potosi
SRI	Servicio de Rentas Internas (Ecuador)
TDM	Transnational Dispute Management
TRIMS	Agreement on Trade-Related Aspects of Investment Measures
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	Arbitration Rules of the United Nations Commission on International Trade Law
US	United States of America
USA	United States of America
USD	US Dollar
VAT	Value-Added Tax
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organization



*‘The common principles of the principal administrative law systems are in my view an important point of reference for the interpretation of investment treaties...’*

T.W. Wälde – Thunderbird v. Mexico  
December (2005) – Separate Opinion.

## CHAPTER I

### INTRODUCTION

#### a. Background to the study

In the last two decades, there have been increasing political, international and academic concerns<sup>1</sup> – especially in developing countries – regarding the interaction between (i) the proliferation and use of International Investment Treaties (IITs) as a mechanism to protect foreign investments and (ii) the exercise of the host state’s sovereign rights to regulate their economic activities as a mechanism to protect their public welfare.<sup>2,3</sup> One of the main concerns arises due to the perception that some countries (mainly developing countries) have on the effects that some international investment standards and arbitral awards have had over the exercise of host state’s sovereign power to adopt new policies and regulations.

Further concerns also arise, on the one hand, when a host state wants to invoke its domestic regulatory power on grounds of public interest<sup>4</sup> to protect public welfare and this consequently affects foreign investors’ interests. On the other hand, other concerns

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<sup>1</sup> See infra, Chapter VI for more details.

<sup>2</sup> According to Black’s Law Dictionary (Eighth Edition) Thomson West, USA 2004, Public welfare is ‘a society’s well being in matters of health, safety, order, morality, economics, and politics.’

<sup>3</sup> Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009 <[http://www.thedti.gov.za/ads/bi-lateral\\_policy.pdf](http://www.thedti.gov.za/ads/bi-lateral_policy.pdf)> (Last visit 03/10/2009). See also A. Sheppard, and M. Hunter, *Introduction: An Overview of the Relationship Between Courts and Investment Treaty Arbitration* in F. Ortino, A. Sheppard, and H. Warner, *Investment Treaty Law – Current Issues Volume I* (British Institute of International and Comparative Law, London 2006), on page 153; and T.W. Wälde, “Equality of Arms” in *Investment Arbitration: Procedural Challenges in Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, USA, 2010), on page 162.

<sup>4</sup> According to Black’s Law Dictionary (Eighth Edition) Thomson West, USA 2004, Public interest can be defined as ‘the general welfare of the public that warrants recognition and protection’.

arise when basic principles that govern the regulatory power of the host state are not sufficiently considered by investment arbitrators in international regulatory disputes due to the fact that the application of these principles has been traditionally carried out by domestic courts. This latter point gives rise to questions concerning the coexistence of some legal principles: (i) the well-known international legal principle which establishes that ‘a [state] may not invoke the provisions of its internal law as justification for its failure to perform a treaty’;<sup>5</sup> (ii) the substantive principles of international investment law; and (iii) the principles related to the exercise of a host state’s regulatory power, such as the principles of domestic (constitutional and administrative) law. The problem which arises from the coexistence of these principles can be one of the reasons of why -from the year 2000 onwards- the emphasis in investment arbitration has shifted to public law matters due to the interpretation of international investment obligations (particularly the fair and equitable treatment standard (FET standard)) alongside regulatory issues of the host state’s conduct.

Within this context, the use of investor-state treaty arbitration (ISTA) as a mechanism to address and attempt to resolve international regulatory disputes<sup>6</sup> (i.e., disputes between a host state and a foreign investor arising from the exercise of the host state’s public authority within its territory<sup>7</sup>) has played a significant role in the public law arena. In this regard, this arbitral mechanism has been used to ‘interpret’<sup>8</sup> the exercise of such public authority and the national law of host states in accordance with the

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<sup>5</sup> See Article 27 of the Vienna Convention on the Law of Treaties (1969) United Nations, *Treaty Series*, vol. 1155, on page 331.

<sup>6</sup> This concept is understood as ‘... [A] disagreement over the existence of a legal duty or, over the extent and kind of compensation that may be claimed by the injured party for a breach of such duty or right.’ Definition taken from <<http://www.businessdictionary.com/definition/legal-dispute.html>> (Last visit 04/10/2009).

<sup>7</sup> G. Van Harten, and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, EJIL (2006) Vol. 17 No. 1, 121-150, on page 125.

<sup>8</sup> ‘The Arbitrators rule on the legality of state conduct, evaluate the fairness of governmental decision-making, determine the appropriate scope and content of property rights, and allocate risks and costs between business and society’. See Van Harten and Loughlin, *supra* note 7.

principles of international investment law, in particular with the FET standard. These questions of interpretation concerning the state's regulatory power have traditionally been resolved by domestic courts through judicial review and by the application of various legal remedies applicable to *Acta Jure Imperii* (acts by right of dominion/public acts) and to areas traditionally in the public domain (*domaine reserve*).<sup>9</sup>

A significant level of importance has been attached to the fact that IITs and ISTAs are also being used by foreign investors to challenge how the regulatory power of host states interferes in the performance of their long-term investments and how these administrative actions violate in consequence the provisions of a BIT. These long-term investments are related to and affect various sensitive and strategic sectors in the host states, such as oil and gas activities, mining concessions and construction.<sup>10</sup> In fact, these activities are considered to be of immense strategic importance for most host states in terms of their economic stability and public welfare. For this reason, it has been argued that the protection of these activities requires preserving legal flexibility within the host state to adopt future economic measures in the aforementioned areas and other critical areas of public interest.<sup>11</sup>

The justification and *raison d'être* for ISTAs is to create a venue for foreign investors to bring a claim against the host state, at the international level, for the violation of any substantive principle established in a specific IIT or in investment law. Examples of these principles are: fair and equitable treatment, national treatment, and most-

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<sup>9</sup> See, e.g., A.G. Adaralegbe, Concurrent Jurisdiction Between Treaty and Domestic Tribunals: An Examination of Jurisdiction-Regulating Mechanisms Within the Investor-State Treaty Arbitration System and Their Effectiveness (CEPMLP, University of Dundee, PhD Thesis, 2009).

<sup>10</sup> See Sub-sections entitled 'Reactions of developing countries' and 'Moving to a law based on need', on pages 350-353 in M. Sornarajah, *A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment*, Int Environ Agreements (2006) 6:329-357. <HeinOnline> (Last visit 29/10/2009).

<sup>11</sup> See Sub-sections entitled 'Reactions of developing countries' and 'Moving to a law based on need', on pages 350-353 in Sornarajah, *supra* note 10.

favoured-nation treatment. Usually, the majority of these types of claims are brought before an International Arbitral Tribunal in accordance with the rules of the ICSID Convention<sup>12</sup> or UNCITRAL Arbitration Rules.<sup>13</sup>

Regarding the application of arbitral rules, it has been stated that most arbitral tribunals have *carelessly* applied standard methods and procedures, familiar to them from commercial<sup>14</sup> arbitration<sup>15</sup> where the rules are designed to be applied to disputes between private parties on commercial matters, particularly when the tribunal lightly dismisses the interests at stake.<sup>16</sup> In this regard, a principle of public law, in particular of administrative law, namely the principle of the supremacy of the host state's public interest, seems to be discarded and overridden in regulatory disputes by a principle of private law such as the principle of party autonomy.

Commenting on this method, some scholars have emphasised that commercial arbitrators tend to see investment arbitration as just another type of commercial dispute between two equal parties.<sup>17</sup> In this regard, it is important to draw attention to the fact that investment arbitrations are largely involved with international regulatory disputes

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<sup>12</sup> 'The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.' Article 1(2).

'The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes between states and investors. It was opened for signature on March 18, 1965 and entered into force on October 14, 1966.'  
<[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home)> (Last visit 07/10/2009).

<sup>13</sup> Adopted by United Nations Commission on International Trade Law on 28 April 1976.

<sup>14</sup> In this regard, it is important to point out that the ICC, as the main International body that deals with arbitration, expressly states that 'ICC activities cover a broad spectrum, which range from arbitration and dispute resolution to making the case for *open trade* and the market economy system, business self-regulation, fighting corruption and combating commercial crime' (Emphasis added). See <<http://www.iccwbo.org/id93/index.html>> (Last visit 30/09/2009).

<sup>15</sup> See Sornarajah, *supra* note 10. See also T. Wälde, *Review of the Book on Investment Treaty Arbitration and Public Law by Van Harten, G.*, (Unpublished), on page 24.

<sup>16</sup> G. Cordero Moss, *Commercial Arbitration and Investment Arbitration; Fertile Soil or False Friends?* in Reinisch *et. al.*, *The Future of International Investment Law*, Pages 724-781 (2009), on page 792.

<sup>17</sup> G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, Oxford University Press, UK 2007), on page 6.

between a host state, relating to the exercise of its regulatory power, and a foreign investor, for the consequent infringement of his rights. It is opportune to highlight here that apart from the previously mentioned regulatory disputes which currently constitute one of the reasons for the exercise of jurisdiction by ICSID tribunals which is based mainly on arbitration clauses in IITs and is activated by the direct exercise of the host state conduct as state-regulator, there is another important type of dispute. There are purely contractual disputes which exist, this type of dispute was formerly the main reason for ICSID arbitration, and mainly involved the host state's conduct as state-contractor and were based on arbitration clauses in investment contracts. The analysis and study of this latter type of investment arbitration is beyond the main scope of this thesis.

International regulatory disputes contrast with commercial arbitrations, which can be characterised as private contractual disputes either between private parties or between public entities and private individuals.<sup>18</sup> It has been pointed out that the commercial arbitration mechanism is considered 'inappropriate' for resolving 'public policy' disputes.<sup>19</sup>

The private law approach taken in some regulatory investment disputes seems to be a result of a reluctance to acknowledge at the international level the application of domestic legal principles related to the host state's public authority and regulatory power by applying principles of international investment law and principles of economic and commercial law exclusively. Hence, aspects of principles of domestic

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<sup>18</sup> S. Wilske, M. Raible, and M. L. Markert, *International Investment Treaty Arbitration and International Commercial Arbitration – Conceptual Difference or only a “Status Thing”?* 1 Contemp. Asia Arb. 213 (2008) <HeinOnline> (Last visit 29/10/2009), on page 215.

<sup>19</sup> J. E. Alvarez, *Chapter Five: The Once and Future International Investment Regime*, ITA Academic Council, Malibu, January 15-16, 2011, on page 7. See also *International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules)* December 2006 – Separate Opinion.

law, in particular constitutional and administrative law, which are of great importance and influence in some legal systems, are disregarded in certain regulatory matters by these international investment tribunals. Principles of constitutional and administrative law are of great importance in some legal systems (i) in matters of the public interest; (ii) for the balanced contribution of public commitments; (iii) in the limitation of economic rights, and, (iv) in the exercise of the public authority in areas of strategic importance.<sup>20</sup>

Additionally, within this context, it has been said that ISTAs tend to be considered by a large section of the arbitration community as private clubs.<sup>21</sup> Moreover, it has also been stated that such clubs are mainly dominated by arbitrators with strong influences from the legal systems of capital-exporting countries (home states) where the notion of a free market prevails in juxtaposition to that of the capital-importing countries (host states) which are accustomed to the frequent exercise of their public authority, public interest and public welfare.<sup>22</sup>

In practice, areas of public law that are related to the state's regulatory power, such as constitutional and administrative laws, have been expressly disposed of or ignored in the arbitration process by some international arbitrators. In fact, this reluctance to refer to public law in the arbitration process prevents an awareness of legal principles that are more sensitive in other legal systems. Perhaps this may be why, from a political

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<sup>20</sup> A. Ledo Nass, *Los Antecedentes y las Fuentes del Arbitraje Internacional* in *Ciclo de Conferencias sobre El Otro Lado del Arbitraje de Inversiones*; PDVSA La Tahona (Caracas, July 2009), pages 177-208.

<sup>21</sup> See Sornarajah, *supra* note 10, on pages 341 and 348. See also S. Wilske, and M. Raible, *The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?* in C. A. Rogers, and R. P. Alford, *The Future of Investment Arbitration* (Oxford University Press, UK, 2009), on page 258.

<sup>22</sup> See Sornarajah, *supra* note 10, on pages 341 and 348.

point of view, international arbitration practices have been rejected, most notably in various developing countries.<sup>23</sup>

Evidence of such a reluctance to acknowledge or ignorance of national legal principles in investment regulatory disputes can be found in various cases. For example, in *Metalclad v. Mexico* (Final award - 2000), where the arbitral tribunal stated that ‘...the Municipality [of Guadalcázar] acted outside its authority’ because it ‘...denied the local construction permit...’ to Metalclad<sup>24</sup>; *CCA and Vivendi v. Argentina* (Final award - 2007) where the arbitral tribunal stated that the case involved ‘illegitimate sovereign acts, ...’<sup>25</sup>; *Waste v. Mexico* (Final award - 2004) where the arbitral tribunal stated that ‘[t]he mere fact that a separate entity is majority-owned or substantially controlled by the state does not make it *ipso facto* an organ of the state.’<sup>26</sup>; *Perenco v. Ecuador* (Decisión sobre Medidas Provisionales - 2009) where the tribunal highlighted that the sovereign power of state can be hampered by an ICSID tribunal when it grants provisional measures<sup>27</sup>; and *Thunderbird v. Mexico* (Separate Opinion - 2006) where the arbitral tribunal pointed out the risk of considering any minimum misconduct by an official as a violation of a BIT provision.<sup>28</sup> All these issues highlighted by these arbitral tribunals are related to domestic administrative law. Consequently, public law issues are of considerable importance in the development and study of international regulatory disputes.

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<sup>23</sup> N. Gamboa Morales, *Consideraciones sobre la práctica arbitral internacional: Un tema de Reflexión*, 2 *Revista Internacional de Arbitraje* (Enero-Junio 2005) 96-123, on page 102.

<sup>24</sup> *Metalclad Corporation v. Estados Unidos Mexicanos* (ICSID Case No. ARB (AF)/97/1) August 30, 2000 – Final Award.

<sup>25</sup> *CAA and VIVENDI v Argentine Republic* (ICSID Case No. ARB/97/3) August 20, 2007 – Final Award.

<sup>26</sup> *Waste Management, Inc v. Estados Unidos Mexicanos* (ICSID Case No. ARB(AF)/00/3) April 30, 2004 – Final Award.

<sup>27</sup> *Perenco Ecuador LTD v. Republica del Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6) May 8, 2009 – Decision sobre Medidas Provisionales.

<sup>28</sup> *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) December 2005 – Separate Opinion.

Within ISTAs, it has been stated that conflicts between domestic public law principles, particularly those deriving from constitutional and administrative laws, and international public law principles, predominantly those from international investment law, might be difficult to resolve except by ‘pragmatic temporary accommodations’ according to some authors.<sup>29</sup>

One of the main reasons for this conflict seems to be because the parties involved in an international regulatory dispute come from different countries, and consequently have different perspectives on the law and on the role and nature of arbitral tribunals. An additional reason for this conflict may be due to the fact that some arbitral tribunals consider the domestic conduct of the state to be a ‘fact’.<sup>30</sup>

Nonetheless, taking into consideration the need to balance the state-investor relationship, which might be essential for the future and effectiveness of investment agreements, one way to improve this balance is by starting to recognize and consolidate the public law principles that are in conflict (domestically and internationally),<sup>31</sup> and consequently having investment arbitrators apply them to settle international regulatory disputes. Applying domestically developed administrative law principles to international regulatory disputes can lead to a different approach being developed. In fact, as will be emphasised in chapter V of this thesis, from around 2000 public law matters have become important to investment arbitrator due to the application of the FET standard in investment arbitration. From the author’s point of view, such domestic administrative law principles have not been sufficiently applied to regulatory disputes

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<sup>29</sup> B. Kingsbury, N. Krisch, and R. B. Stewart, *The Emergence of Global Administrative Law*, Vol. 68 Law and Contemporary Problems (Summer/Autumn 2005), on page 30.

<sup>30</sup> International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules) January 26, 2006 – Final Award, on paragraph 27. See also Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, UK, 2009), pages 69-72.

<sup>31</sup> See A. Van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal* Indiana Journal of Global Legal Studies - Volume 16, Issue 2, Summer 2009, pages 483-512.



owing to the fact that ISTAs were formerly considered to form a part of the private law system (i.e., ISTAs were influenced by the procedural framework and enforcement structure of international commercial arbitration as a private model of adjudication).<sup>32</sup>

In this context, and considering that public international law is inspired by domestic public law and in particular by some principles of administrative law,<sup>33</sup> the lessening of the conflict between principles will bring more legitimacy to the expanding system of ISTAs.<sup>34</sup> The use of these domestic legal principles at the international level can be a solution to finding acceptable solutions within the unique international forum of ISTAs as a mechanism that mainly revolves regulatory disputes.<sup>35</sup> This will be so particularly if it is argued that the preservation of the future of foreign investment clearly calls for the need to use local resolutions.<sup>36</sup>

Moreover, a state acts at the national and international levels in accordance with the principles of public (international and national) law, which are – in essence – *the state's natural rule of justice*.<sup>37</sup> With the exception of domestic courts, ISTAs are currently the most important and direct common forums to settle disputes between host states and private individuals, including the review of the regulatory conduct of the former.<sup>38</sup>

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<sup>32</sup> J. D. M. Lew, L. A. Mistelis, and S. M. Kroll, Comparative International Commercial Arbitration (Kluwer Law International, The Hague, London, New York, 2003). See also Van Harten and Loughlin, *supra* note 7, on pages 125-127.

<sup>33</sup> See S. Cassese, *Global Standards for National Administrative Procedure*, Vol. 68 Law and Contemporary Problems (Summer/Autumn 2005), on page 121.

<sup>34</sup> 'Legitimacy is property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively *because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process*.' (Emphasis added). See T. M. Franck, The Power of Legitimacy among Nations (Oxford University Press, UK 1990, on page 24.

<sup>35</sup> See Kingsbury, Krisch, and Stewart, *supra* note 34, pages 53-54; See also Cassese, *supra* note 38.

<sup>36</sup> See P. Muchlinski, 'Caveat Investor'? *The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, ICLQ vol 55, July 2006, 527-558. <[www.HeinOnline.com](http://www.HeinOnline.com)> (Last visit 29/10/2009/), on page 557.

<sup>37</sup> P. Cane, Administrative Law (Fourth Edition, Oxford University Press, UK 2004), on page 134.

<sup>38</sup> *Investor-State Disputes: Prevention and Alternatives to Arbitration* – UNCTAD Series on International Investment Policies for Development – UNCTAD, New York and Geneva, 2010, on page 1. <[http://www.unctad.org/en/docs/diaeia200911\\_en.pdf](http://www.unctad.org/en/docs/diaeia200911_en.pdf)> (Last visit 12/04/2011).

Nevertheless, IITs are signed only by and among sovereign states in accordance with their internal interests and with the protection of their public welfare to the fore, and along with a view to continuously improving their economic development.<sup>39</sup> These sovereign states act in their public law capacity at the international level as the main subjects of public international law.<sup>40</sup> Therefore, their international agreements and international obligations should be mainly interpreted in accordance with the precepts of public international law, in particular with the provisions of the Vienna Convention on the Law of Treaties. However, within this context, one may ask whether principles of domestic law are excluded from the above-mentioned international law premise when regulatory issues related to the domestic conduct of the state need to be evaluated in investment arbitration.

For this reason, it has been said that IITs cannot be seen as a type of '[investment] insurance'<sup>41</sup> – a guarantee or protection against bad business decisions.<sup>42</sup> Furthermore, they should not be considered to be a mechanism that categorically protects the investors' legal interests over those of the state.<sup>43</sup> It must be taken into account that a foreign investment cannot totally be isolated from the general economic situation of the

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<sup>39</sup> See, e.g., the preamble of the Venezuela-Vietnam BIT; the Venezuela-Belarus BIT; the Venezuela-Barbados BIT; the USA-Argentina BIT; the USA-Ecuador BIT; the USA-Panama BIT; the Colombia-Peru BIT; the Colombia-Switzerland BIT; the Colombia-UK BIT; the Colombia-Spain BIT; the Colombia-Chile BIT; and the Colombia-Cuba BIT.

<sup>40</sup> Contemporary Public International Law has recognized, with distinct powers and purposes from the states, some international organizations as proper subjects of international law such as the United Nations, European Union, the Organization of American States, etc. See *Reparation for injuries suffered in the service of United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 174. Additionally, International law does not prohibit individuals from being recognized as subjects of international law. However, it will depend on the circumstances. Examples of these circumstances are the development and recognition of human rights and the humanitarian treatment of the victims of war in international law. See I. Brownlie, *Principles of Public International Law* (Seventh Edition, Oxford University Press, Oxford 2008), chapter 25.

<sup>41</sup> CMS Gas Transmission v. Republica Argentina quoted by F. Godoy, *El Caso Argentino: protección de inversiones v. facultades soberanas*, 2 Revista Internacional de Arbitraje (Enero-Junio 2005) 124-154, on page 134; See also Muchlinski, *supra* note 41.

<sup>42</sup> In this regard, three major duties of investors have been identified: (i) a duty to refrain from unconscionable conduct; (ii) a duty to engage in the investment in light of an adequate knowledge of risk, and (iii) a duty to conduct business in a reasonable manner. See also Muchlinski, *supra* note 41.

<sup>43</sup> R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. Int'l L. & Pol. 953 (2006), on page 970; See also Z. Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, Arbitration International, Vol. 22, No. 1 (2006).

host state.<sup>44</sup> In fact, this is precisely where the question arises concerning where to draw the line between the protection of foreign investments and the exercise of sovereign powers of the host state.

Having addressed the issue, from the perspective of applying the ‘appropriate’<sup>45</sup> legal principles to international regulatory disputes, this author is of the opinion that more attention should be afforded to *the principles which are inherent to the host state’s regulatory conduct*. This suggestion includes the reference to those legal principles contained within domestic (constitutional and administrative) law, in conjunction with principles of public international law, including the principles of international investment law. This referencing exercise could be materialized by taking into account, as some authors have pointed out, the analogy that exists between international regulatory disputes and *domestic administrative law*.<sup>46</sup> Understanding this analogy would probably help to improve and balance the relationship between host states and foreign investors.

In conclusion, with regard to these premises, it is important to highlight here the fundamental questions that may be posed by public-law lawyers: (i) the legal nature of ISTAs; (ii) the legal principles applied to them; (iii) the exercise of the host state’s regulatory power; and (iv) interpretation,<sup>47</sup> i.e., the manner in which international arbitrators interpret and apply these legal (international and domestic) principles to ISTA<sup>48</sup>, as a mechanism that largely deals with international regulatory disputes.

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<sup>44</sup> See Godoy, *supra* note 46, on page 134.

<sup>45</sup> It has been asserted that ‘the law which governs this instrument is public international law and not private law, since the law governing the arbitration is treaty law rather than contract law’. See Van Harten, *supra* note 17, on page 128.

<sup>46</sup> See Van Harten and Loughlin, *supra* note 7, on page 121.

<sup>47</sup> See Douglas, *supra* note 48, on page 38.

<sup>48</sup> It is argued that ‘...arbitrators interpret and apply public law with limited court supervision...’. See Van Harten, *supra* note 17, on page 5.

### **b. Objective of the study and research questions**

The main objective of this research is mostly confined to examine the extent to which the principles of domestic administrative law can be used as a legal reference for investment arbitrators in addressing and resolving the regulatory issues presented at ISTAs. In arriving at an answer to this particular question the following will be considered: (i) the use of administrative law principles as a part of the unitised nature of the law that determines the ‘state of law’ of any democratic society; and (ii) the argued current crisis of legitimacy that the investor-state treaty arbitration system is facing.<sup>49</sup>

For this purpose, the present research is undertaken by way of a comparative analysis of the French and British administrative legal systems. The aim of this comparison is to identify the common institutions and principles that are domestically used by host states to determine the legal and regulatory relationship between private actors and their public administrations (i.e., the state).

Special consideration is given to the exercising of the host state’s public authority in areas of economic interest as well as those principles related to legal mechanisms that are internally used to adjudicate any national regulatory dispute between the state and economic actors.

Furthermore, conceptual and critical assessments are expanded upon with regard to IITs and ISTAs, respectively. The main purpose of these assessments is to identify and analyze the principles that have been developed in the international arena and have been used to settle international (regulatory) disputes between host states and private investors/actors.

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<sup>49</sup> See B. Kingsbury, and S. W. Schill, *Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 75.

Additionally, an arbitral practice review is carried out in order to identify the factual statements that arbitral tribunals have included in their arbitral awards which could be framed within the scope of the main principles of administrative law previously identified.<sup>50</sup> This exercise is performed by taking into consideration that the current investor-state arbitration system -as a mechanism that largely deals with regulatory disputes- is (i) analogous to domestic administrative adjudication that provides (ii) legal mechanisms to address regulatory disputes between host states and private actors, including foreign investors when (iii) the public authority of the host state may be compromised.

Finally, a reflection on the current investor-state arbitration system is given with the aim of identifying the political and academic concerns that are affecting the legitimacy of this arbitral system.

For the purpose of conducting this research, the following questions are tabled:

***Main research question:***

**To what extent can institutions and principles of administrative law be applied to investor-state treaty arbitrations?**

***Subsidiary questions:***

**Which institutions and principles of administrative law can be applied to investor-state treaty arbitrations?**

**Why are institutions and principles of administrative law important in the interpretation of the investor-state treaty arbitrations?**

As previously mentioned, to answer these questions, this research consists of three major parts: (i) the comparative analysis of the most common institutions and

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<sup>50</sup> Understanding this as the '*Principium est primum*', i.e., that which acts as the origin of what follows. See A. Moles Caubet, *El Principio de Legalidad y sus Implicaciones* (Publicaciones del Instituto de Derecho Publico, Facultad de Derecho, Universidad Central de Venezuela, Caracas – Venezuela 1974).

principles that have been developed domestically in the French and British administrative legal systems; (ii) the identification and study of the principles which have been applied by international arbitrators in investment treaty disputes; (iii) the review of the arbitral practice used in a sample of arbitral awards, and reflections on these legal principles and ISTAs as a mechanism that largely deals with international regulatory disputes. Splitting the research into three main parts identified the most significant findings, which guided the research to an elaborate and fully-documented conclusion.

In addition, the domestic administrative legal institutions and principles are examined as a reference benchmark, and this is compared to the institutions and principles from international investment law in order to potentially demonstrate that a more balanced outcome may be attained than under the current arbitral practice.

This research is structured upon the identification and analysis of the institutions and principles that have been established and developed by scholarly literature as well as the principles that have been created by national courts decisions and investment arbitration awards.

### **c. Importance of the study**

Some of the most important requirements for this type of public law research are found in current arbitral practice. For example, in a separate opinion in *Thunderbird v. Mexico* (2006), it was stated that ‘[t]he common principles of the principal administrative law systems... are an important point of reference for the interpretation

of investment treaties'.<sup>51</sup> In the same arbitral arena, it can be also evidenced how investment tribunals are resorting to domestic law sources to support their decisions, albeit in a conservative but progressive manner.<sup>52</sup>

Furthermore, as a consequence of the current results of the investor-state arbitration practice as a mechanism that largely deals with regulatory disputes at the international level, an important group of scholars have also expressed their concerns about the expanding international arbitration system and the adjudication of public law matters at the international level.<sup>53</sup> The expansion of this system also seems to be suffering a crisis of legitimacy. In this respect, as a way to mitigate the growing crisis of legitimacy of this system, this group of scholars has also suggested that the application of principles deriving from municipal law to this type of international regulatory dispute would be a preferred way of protecting the host state's national welfare. In particular, it has been said that this exercise could provide a mechanism to establish a framework of predictability and stability between states and investors.<sup>54</sup>

Within this context, the application of public law principles to treaty-based regulatory disputes plays an important role in the current perception of the relationship between domestic (constitutional and administrative) law (of the host state) and international

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<sup>51</sup> See, e.g., *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion, paragraph 28.

<sup>52</sup> See, e.g., *Mobil Corporation et al v. Bolivarian Republic of Venezuela* (ICSID Case ARB/07/27) June 10, 2010 – Decision on Jurisdiction, paragraph 81; *Azurix Corp. v. la Republica Argentina* (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award, paragraph 67; *Occidental Exploration and Production Company v. The Republic of Ecuador* (London Court of International Arbitration Administered Case No. UN 3467) July 1, 2004 – Final Award, paragraphs 58 and 137; and, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award, paragraph 69.

<sup>53</sup> *Public Statement on the International Investment Regime dated August 31, 2010* – Osgoode Hall Law School, York University (Toronto, Canada) – York University Website <[http://www.osgoode.yorku.ca/public\\_statement/](http://www.osgoode.yorku.ca/public_statement/)> (Last visit 26/11/2010).

<sup>54</sup> Dolzer, *supra* note 48, on page 1.

investment law (relevant to foreign investors).<sup>55</sup> In particular, it can be taken into consideration that domestic law principles should be examined by investment arbitrators to determine whether a given host state's regulatory conduct has been adjusted not only to the obligations imposed by an IIT, in particular to the FET standard, but also to these domestic law principles.<sup>56</sup> Supporting this opinion, this is why it has been said that there is a current debate about reconciling public policy concerns with IITs.<sup>57</sup>

For this reason, it could be assumed that the application of administrative law principles developed domestically to international regulatory disputes can help in finding common ground between the two legal positions held by the host states and foreign investors. On the one hand, the host state can (i) protect the public welfare and exercise its public authority as a '*Paterfamilias*'<sup>58</sup> representing the public interest of its people and (ii) guarantee – at the same time – the legal protection of those individuals who have economic interests within its territorial frontiers. On the other hand, the common ground may help to reduce (i) the perceived host state's reluctance to negotiate and conclude new IITs as well as (ii) their rejection of the current international arbitration practices.<sup>59</sup>

In this respect, considering that investments directly involve the economic interests of the host state and on many occasions the host state's public authority, the author thinks that the applicable legal regime that governs those interests should mainly be the

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<sup>55</sup> W. Burke-White, and A. Von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations* in S. W. Schill, International Investment Law and Comparative Public Law (Oxford University Press, UK 2010), pages 689-720.

<sup>56</sup> See Dolzer, *supra* note 48, on page 955.

<sup>57</sup> See Wilske, Raible and Markert, *supra* note 18, on page 220. See also Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, *supra* note 3.

<sup>58</sup> A. Watson, Roman Law and Comparative Law (The University of Georgia Press, Athens and London 1991), on page 9.

<sup>59</sup> *SGS v. Philippines*, quoted by Z. Douglas, see *supra* note 35, on page 85.



principles of public law, including domestic constitutional and administrative legal principles, which are at the heart of any state's actions.

Nevertheless, other scholars think that, when the host state concludes investment treaties with other states, in order to improve the economy within its territory, this process will exclusively involve the application of principles of private law, e.g., the immutable principle of '*pacta sunt servanda*' (agreements must be kept) and the principle of 'party autonomy' and it leaves aside other principles of law such as principles of public law. Controversially, based on the previous assumption, there is even a group that argue that the investors' interests override those of the state.<sup>60</sup>

Some authors, pursuing a more balanced approach, have considered that IITs and ISTAs need to provide a fair equilibrium between the protection of foreign investors and the host state's economic and social objectives,<sup>61</sup> i.e., the protection of its public welfare through the exercise of its regulatory power. Thus, many of the rights involved in ISTAs are largely concerned with public law matters and this draws the distinction between investment arbitration and commercial arbitration.<sup>62</sup>

The main concern regarding the two opposing positions is how to best attain an adequate equilibrium between the interests of private actors and those of the state, including the exercise of its public authority.<sup>63</sup>

The necessity to balance these two perspectives is essential for the future success and effectiveness of investment treaties. In fact, it has been asserted that ISTAs need to

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<sup>60</sup> See Dolzer, *supra* note 48, on page 970.

<sup>61</sup> See Sornarajah, *supra* note 10.

<sup>62</sup> See C. Brower, *W(h)ither International Commercial Arbitration (The Goff Lecture 2007)* Arbitration International, Vol. 24, No. 2 (2008). <[www.HeinOnline.com](http://www.HeinOnline.com)> (Last visit 29/10/2009).

<sup>63</sup> See G. Peele, *The Rule of Law in Britain Today* (Constitutional Reform Centre and the Hughenden Foundation, UK 1987).

operate in an effective manner in order to reach an acceptable degree of political legitimacy.<sup>64</sup>

Based on this last observation, it can be said that even though treaty-based regulatory disputes have been considered to act as a mechanism to internationally settle a dispute between a host state and a foreign investor, the ‘ordinary’ forum used to deal with this kind of regulatory dispute has frequently been the domestic legal system.<sup>65</sup> For this particular reason, it has also been stated that international regulatory disputes are legal mechanisms that are analogous to domestic administrative law,<sup>66</sup> specifically to judicial review relating to governmental acts, i.e., a form of international judicial review.<sup>67</sup> Previously, there were concerns about the interpretation and use of these legal mechanisms due to the manner in which arbitrators decided issues regarding the host state’s public policy in arbitral awards. There is a kind of ambiguity that has led arbitral tribunals to interpret IITs and ISTAs as a way of expanding the comparable standards under customary international law as well as domestic public law.<sup>68</sup> For example, it has been argued that investment arbitrators have (i) ruled on the legality of state (domestic) conduct; (ii) evaluated the fairness of governmental decision-making; (iii) determined the appropriate scope and content of property rights; and, (iv) allocated risks and costs between business and society.<sup>69</sup> These latter points have been traditional areas of study in administrative law.

One factual example of an arbitral tribunal ruling on state conduct can be specifically found in *Metalclad v. Mexico* (2000). In this case the arbitral tribunal stated that (i)

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<sup>64</sup> See Muchlinski, *supra* note 41.

<sup>65</sup> See, e.g., Adaralegbe, *supra* note 9.

<sup>66</sup> See Van Harten and Loughlin, *supra* note 7.

<sup>67</sup> See *Thunderbird v Mexico* (2006), *supra* note 56.

<sup>68</sup> See Van Harten, *supra* note 17, on page 82.

<sup>69</sup> See Van Harten and Loughlin, *supra* note 7, on page 147.

‘...the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government...’ and (ii) ‘...the Municipality [of Guadalcázar] acted outside its authority’ because it ‘...denied the local construction permit...’ to Metalclad. Another factual example can be found in *Occidental v. Ecuador* (2004) where the arbitral tribunal stated, when ruling upon a taxation matter, that Ecuador failed to provide a stable and predictable regulatory framework in terms of changing Ecuador’s tax law.

This case law serves to illustrate how arbitral tribunals have ruled on the regulatory conduct of the state without clearly distinguishing between areas which are traditionally the public domain (*domaine réservé*)<sup>70</sup> of the state such as *Acta Jure Imperii* (i.e., acts by right of dominion/public law acts) and *Acta Jure Gestionis* (i.e., acts by right of management/private law acts). The former has traditionally been decided by domestic courts or by the International Court of Justice as it involves matters of a state’s sovereign rights. Meanwhile, the latter could be decided by investment arbitral tribunals for dealing with acts of management imputable to the state, i.e., (i) legal matters that do not relate to the state’s sovereignty and (ii) the waiving of the principle of jurisdictional state immunity. In this regard, it is opportune to quote Prof. Dolzer who says ‘[d]epending upon how [arbitral tribunals interpret and apply] all areas of domestic law affecting foreign investment’, the arbitral tribunals will be dealing, in one way or another, with areas which are traditionally the *domaine réservé* of the said state.<sup>71</sup>

As previously mentioned, some academics have asserted and emphasized that treaty-based regulatory disputes are purely about public law matters since the public

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<sup>70</sup> See Dolzer, *supra* note 48, on page 964.

<sup>71</sup> *Ibid.*, on page 964.

authorities are the main ones who have legitimacy and delegated power to exercise the host state's regulatory activity and protect the public welfare.<sup>72</sup> Other scholars have pointed out that the best way to face this legal debate internationally (between foreign investments and the exercise of public authorities by host states on the grounds of protecting the public welfare) is through the elaboration of a comparative framework on principles of public law, which should be the first port of call.<sup>73</sup>

To this end, with the elaboration of such a comparative framework, investment arbitrators and scholars could rely on an academic reference that can subsequently be applied to regulatory disputes in preference over commercial arbitration concepts upon which most arbitrators subconsciously rely.<sup>74</sup> For example, this occurred in the *Thunderbird v Mexico* case when one of the arbitrators insisted, in a separate opinion, that, based on 'presumptions and other rules of evidence' (despite the arbitral tribunal's stated stance that it cannot rely on presumptions or inferences), the existence of a '*solicitud* [written request], *oficio* [formal response] and subsequent conduct' gave rise to legitimate expectations for the Claimant. By making this assumption, the Arbitrator ignored the content and application of other very important principles of administrative law, such as the principle of legality. In this respect, it is of the utmost importance to point out that within the public law sphere there are principles of administrative law, known as *principles of legality* and *principles of unauthorised delegation*, that assert that a public authority is allowed to do what is expressly established by law. This is juxtaposed to the principle of private law known as the *principle of party autonomy*,

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<sup>72</sup> See, e.g., Van Harten, *supra* note 17. See also Van Harten and Loughlin, *supra* note 7; S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010); and, M. Sornarajah, *The International Law of Foreign Investment* (Second Edition, Cambridge University Press, UK 2004).

<sup>73</sup> See also Van Harten, *supra* note 17, on page 143; and *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 56, paragraph 28.

<sup>74</sup> See Wälde, *supra* note 15, on page 27.

which provides that an individual is allowed to do what is not expressly forbidden by law.

In summary, the importance of the administrative law principles to the relationship between the state and individuals (both nationals and foreigners), has been underestimated for many years.<sup>75</sup> Thus, there is a general assumption that administrative law is mainly related to a state's actions and its bureaucracy, and that IITs and ISTAs are mainly related to foreign investment protection. However, it can be said that the current arbitral practice could require that investment arbitrators rely more on their administrative law culture when dealing with regulatory disputes. Professor M. Sornarajah pointed out that '[t]he attempt to import into [investment] treatment standards, the whole body of principles of administrative review, into the arbitration of investment disputes through the fair and equitable standard, is a visible factor'.<sup>76</sup>

#### **d. Literature Review<sup>77</sup>**

Due to the increasing consideration that the FET standard has been given by arbitral tribunals -in particular from the year 2000 onwards- investment arbitrations have shifted to public law issues in order to resolve investor/state regulatory disputes. This particular arbitral approach has consequently resulted in the fact that literature in the field has also started to discuss this shift.

In this regard, the development of this latter approach has called for a review of the host state's administrative powers by arbitral tribunals. This approach has also been of

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<sup>75</sup> See Van Harten, *supra* note 17, on page 6.

<sup>76</sup> See Sornarajah, *supra* note 77, on page 341.

<sup>77</sup> The cut-off date for the update of materials was November 2011 as this thesis was submitted in January 2012. The *Viva Voce* examination of this thesis was made on the 19<sup>th</sup> June 2012. The examining committee suggested minor revisions to be made to the thesis which were carried out during July and August of 2012. Finally, this thesis was officially submitted on the 3<sup>rd</sup> November 2012.

special importance for scholars and practitioners in the area. Based on the above-mentioned development, the expanding scholarly literature on this subject has shown that there is a debate relating to two main areas: (i) administrative law based on notions of domestic host states' public authority and host states' public interest, and (ii) investment law based on notions of foreign investors' interests and investment treaty arbitration.

Specifically, within these areas, there are two further sub-areas, the first of which states that commercial arbitrators tend to see regulatory disputes (investment arbitrations) as 'just another type of commercial dispute between two equal parties...' <sup>78</sup> and consequently they review the host state's regulatory conduct.

The second sub-area conversely states that (i) foreign investors are not on an equal level with host states and (ii) that host states and foreign investors may not be on an equal level either in international law or in domestic law in terms of the host state's right of exercising its public authority or the commitment to protecting its public welfare. <sup>79</sup>

A vast amount of scholarly literature exists on the legal aspects of IITs and the application of international investment law principles to ISTAs. There is a dearth of scholarly literature concerning the new tendency to consider ISTAs as regulatory disputes and addressing their similarity to certain domestic administrative law mechanisms. However, it seems that a detailed study has not been written on the application of the domestically developed administrative law principles to ISTAs which should be considered as a mechanism that largely deals with regulatory disputes. A

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<sup>78</sup> See also Wilske, Raible and Markert, *supra* note 18.

<sup>79</sup> See Van Harten, *supra* note 17, on page 130 and Wälde, *supra* note 15, on page 25.

requirement for studies like the present one, seems to be flourishing currently in order to act as an alternative to fill the gap that exists in arbitral practice due to the lack of guidelines addressing the unilateral/regulatory power of the state at the international level. This gap seems to be affecting the relationship between states and foreign investors.<sup>80</sup>

Nevertheless, the aforementioned areas (administrative law; regulatory power of the state, investment and investment law) are related to this research. There are three emerging arguments to improve the relationship and develop these areas:

### *1. Analogy of ISTAs with domestic administrative law*

The recent and rapid development of investment treaty arbitrations has indicated that some scholars study these issues from a public law perspective.<sup>81</sup> Scholars have argued that investment treaty arbitration ‘...is best analogized to domestic administrative law rather than to international commercial arbitration, especially since investment arbitration engages disputes arising from the exercise of public authority by the state as opposed to private acts of the state.’<sup>82</sup>

Additionally, it has also been stated that ‘...by obliging states to arbitrate disputes arising from sovereign acts, investment treaties establish investment arbitration as a mechanism to control the exercise of public authority. For this reason, in particular,

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<sup>80</sup> See Dolzer, *supra* note 48, on page 972.

<sup>81</sup> In this regard, it has been stated that ‘[t]he legal rules governing investment arbitration could also be regarded as a form of administrative law’. See I. Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 378.

<sup>82</sup> See Van Harten and Loughlin, *supra* note 7, on page 121. See also *Thunderbird v. Mexico* (2006) – Separate Opinion; and Burke-White and Von Staden, *supra* note 60, on page 691; and A. Van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative view* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 720.

*‘investment arbitration is best analogized to domestic administrative law.’*<sup>83</sup> (Emphasis added).

It has further been asserted that ‘[One of the] subject-matters of investment [treaty] arbitration is [resolving] a *regulatory dispute* arising *between the state* (acting in a public capacity) *and an individual who is subject to the exercise of public authority of the state*’<sup>84</sup> (Emphasis added).

Hence, the abovementioned extracts serve to emphasize the same idea of how to create a rule of coexistence between the exercise of a host state’s public authority (administrative law) and foreign investments (investment law). This need seems all the more pressing due to the fact that IITs and ISTAs are affecting more critically important areas in the host states in a more complex and detailed manner.<sup>85</sup>

The presumption of such an analogy between ISTAs as a mechanism that mostly deals with regulatory disputes and administrative law (judicial review and another legal remedy) is a contribution to the correction of any divergence from the appropriate models of investment protection in the interest of reaching or awarding a fair and equitable solution between the parties to a dispute.<sup>86</sup> This is especially the case if this international regulatory dispute can be resolved by the application of not only principles of international investment law, but also of principles of public (administrative) law. For this reason, it is opportune to mention here that the present research has developed on the particular presumption of considering international regulatory disputes analogous to some domestic administrative law institutions.

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<sup>83</sup> See Van Harten and Loughlin, *supra* note 7, on page 146; and Adaralegbe, *supra* note 9, on page 149.

<sup>84</sup> See Van Harten and Loughlin, *supra* note 7, on page 148.

<sup>85</sup> See Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, *supra* note 3, on page 47.

<sup>86</sup> *Ibid.*, on page 7.



## 2. *ISTA as a species of global administrative law (GAL)*<sup>87</sup>

The internationalization of some branches of domestic law such as international criminal law, international environmental law, international investment law, international economic law<sup>88</sup> – as a part of global governance<sup>89</sup> and as a product of the active and inevitable participation of states in the global economy – has also lead to the materialization of another branch of law known as ‘global administrative law’<sup>90</sup> or *lex administrativa*.<sup>91</sup> Global administrative law is understood as ‘a set of transnational rules whose main objective is to deal with the consequences of globalization in different areas, such as international trade; finance; telecommunications; security; environment and intellectual property, amongst others’.<sup>92</sup>

Recently it was indicated that one of the elements which contributed to this materialization of a new branch of law was the creation of ICSID and the proliferation of IITs and ISTAs. This occurred in the 1990s and was a means of promoting the participation of foreign investors in host states’ local economies.<sup>93</sup>

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<sup>87</sup> In relation to this area, there is a special project known as the “Global administrative law project” which is being conducted by the New York University Institute for International Law and Justice. See <<http://www.iilj.org/GAL/>> (Last visit 04/10/2009)

<sup>88</sup> This branch of law is regarded as a mixture of traditional Mercantile Law and Administrative Law, whose main role is to regulate the economic activities of the state.

<sup>89</sup> Which ‘...can be understood as administration, and such administration is often organized and shaped by principles of administrative character...’. See Kingsbury, Krisch, and Stewart, *supra* note 34, on page 2.

<sup>90</sup> *Ibid.* See also Dolzer, *supra* note 48, on page 971; and, Alvarez, *supra* note 19.

<sup>91</sup> J. Robalino-Orellana, and J. Rodríguez-Arana Muñoz, *Global Administrative Law – Towards a Lex Administrativa* (CMP Publishing Limited) <<http://www.iilj.org/GAL/documents/GALlexadminbook.pdf>> (Last visit 04/08/2011).

<sup>92</sup> J. Barraguirre, and X. Fuentes, *Acuerdos internacionales de inversión, sustentabilidad de inversiones de infraestructura y medidas regulatorias y contractuales*, Comisión Económica para América Latina y el Caribe (CEPAL), Naciones Unidas, Junio 2010. Available at: <<http://www.cepal.org/cgi-bin/getProd.asp?xml=/publicaciones/xml/3/40483/P40483.xml&xsl=/drni/tpl/p9f.xsl&base=/drni/tpl/top-bottom.xsl>> (Last visit 30/07/2012).

<sup>93</sup> J. A. Muci Borjas, *El Derecho Administrativo Global y los Tratados Bilaterales de Inversión (BITs)* (Editorial Jurídica Venezolana, Caracas, 2007), on page 121.

At the same time, this materialization has created a new kind of international forum to deal with the legal differences that arise between host states and investors. This is especially so when the host state – rightly or wrongly – exercises its regulatory power within its territory and by doing so may – directly or indirectly – affect investors’ interests.

Some authors consider that ISTA is ‘[a] semi-autonomous international adjudicative body that reviews and controls state conduct in the public sphere’. They also state that ISTAs are part of the state’s public system which can also be considered a *species of global administrative law*.<sup>94</sup> For this reason, they argue that the phenomenon of globalization ‘has led to the formation of complex governing arrangements at domestic, regional and international levels’ and these arrangements have given rise to ‘international and regional bodies equipped with a broad range of regulatory powers’. This latter argument constitutes a new institutional configuration which is currently better known as ‘global administrative law’.

Based on the previous observation, this can also be assumed that ISTA together with IITs may also consider to be incorporated as part of the public system of the state. This latter aspect may also be deemed to be a further element which has encouraged the emergence of global administrative law (see Annex A for a methodological explanation).

In this respect, within the context of this research, it is important to mention here that ISTAs need to be well thought-out because they have been created as a ‘special’ and temporary international forum to openly adjudicate upon the exercise of public authority of the host state involved. However, ISTAs do not seem to be formed with the

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<sup>94</sup> See Van Harten and Loughlin, *supra* note 7; and Kingsbury, Krisch, and Stewart, *supra* note 34.

intention of creating autonomous and independent international organizations in charge of solving investor/state regulatory disputes. The possible of creating an international court is summarized in the next sub-section.

Nonetheless, it has to be emphasized that *global governance* and *global administrative law* are two new elements of increasing importance that have an inherent and primary relationship (verging on interdependence) with a state's behaviour relating to foreign investors.<sup>95</sup>

Finally, it needs to be emphasized that global administrative law seems to have a closer relationship with the branch of administrative law that mainly regulates the structure and operation of international organizations and their activities. Examples of these organizations are the WTO and ICSID. They establish rules of coexistence between the contracting states' sovereign conduct about the tendency for investment, trade and services.<sup>96</sup> These international organizations are also known as international administrations which operate parallel to domestic public administrations.<sup>97</sup> The validity of this latter assumption is beyond the scope of this research. Nonetheless, it is opportune to highlight here that the previously mentioned assumption differs considerably from the main scope this research which is confined to the identification of those principles and institutions of domestic administrative law that have existed in domestic law for over seventy-five years in private individual/state regulatory disputes at a local level. These disputes can also be used as a source to understand and deal with

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<sup>95</sup> See Dolzer, *supra* note 48, on page 972; and A. M. Slaughter, and S. R. Ratner, *The Method is the Message* 36 *Stud. Transnat'l Legal Pol'y* 239 (2004), on page 262.

<sup>96</sup> Stewart, R. B., *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, IILJ International Legal Theory Colloquium Spring 2010: The Turn to Governance: The Exercise of Power in the International Public Space; Institute for International Law and Justice, (New York, Discussion Draft January 2009).

<sup>97</sup> See Robalino-Orellana and Rodríguez-Arana Munoz, *supra* note 96. See Muci Borjas, *supra* note 98, on page 31.

the legal nature of international regulatory investment disputes arising from the domestic exercise of the host state's regulatory power.<sup>98</sup>

### 3. *The creation of an international investment court*

The idea of creating an international investment court has recently emerged.<sup>99</sup> This idea has been proposed to create a unique way of dealing with legal disputes between host states and foreign investors.<sup>100</sup> Various authors have considered this creation to be an alternative mechanism to the current investment arbitrations.<sup>101</sup> This alternative mechanism is based on the following concerns: the consideration of ISTAs as (i) non-permanent tribunals; (ii) implying large, expensive and unforeseeable arbitral procedures; (iii) with occasionally contradictory awards; and, (iv) non-appealable decisions.

The creation of this international court may be considered completely unnecessary and in violation of the principles of unity of the state and its governmental apparatus of imparting justice. This is especially true if the argument of some scholars concerning the jurisprudential development of this type of investment tribunal is taken into account. This will mainly depend on the methodology that applies equally to (international or national) regulatory disputes and how the relevant rules of investment law and public law, including administrative law, are interpreted.<sup>102</sup>

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<sup>98</sup> See Stewart, *supra* note 103. See also Dolzer, *supra* note 48, on page 972

<sup>99</sup> See Van Harten, *supra* note 17, on page 152; H. Rondón de Sansó, *Aspectos Jurídicos Fundamentales del Arbitraje Internacional de Inversión* (Editorial Ex libris, Caracas, 2010); O. E. García-Bolívar, *Has the time arrived for permanent investment tribunals?* Selected Works (March 2012) and H. Rondon de Sanso, *Los Problemas Jurídicos planteados en los Arbitrajes Internacionales de Inversión*. <<http://www.pdvsa.com/interface.sp/database/fichero/free/5001/640.PDF>> (Last visit 26/09/2009).

<sup>100</sup> See Van Harten, *supra* note 17, on page 184. See also J. D'Agostino and O. Jones, *Energy Charter Treaty: a Step Towards Consistency in International Investment Arbitration?* Journal of Energy & Natural Resources Law Vol. 25. No. 3 (2007) <<http://www.herbertsmith.com/NR/rdonlyres/DF61A094-AAAF-4952-ADE8-D8B687F377FB/4670/JERNLAug2007.pdf>> (Last visit 08/09/2009).

<sup>101</sup> See *supra* note 106.

<sup>102</sup> See Dolzer, *supra* note 48, on page 970.

Conversely, some scholars have shown their support for the idea of creating this kind of investment tribunal.<sup>103</sup> Perhaps this support may be based on the probability of creating an international legal forum in which one either seeks to expressly apply those principles that are in fact reflected in domestic law or in global administrative practices, or one seeks to allow more homogenous arbitral awards to be granted.

Nevertheless, one of the main concerns with the creation of this investment court is how to apply or adopt these eventual global administrative practices and principles to the area of ISTA and multilateral relations, in which it has been said administrative law is currently rudimentary or non-existent.<sup>104</sup> In this regard, it has been stated that '[r]ules governing a state's unilateral acts in international law have never been codified and remain controversial on a certain number of points.'<sup>105</sup> The previous quotation illustrates the suggestion of J.E. Alvarez about the application of these principles (of administrative law) to multilateral relations may go beyond where many states want to go.<sup>106</sup> Additionally, the creation of *an international investment appellate system* has also been proposed.<sup>107</sup> Nonetheless, the analysis and study of creating an international investment court, as well as the creation of an appellate system, are beyond of the scope of this study.

In summary, many authors have written about IITs from the perspective of the protection of foreign investments and the application of international investment law in investment arbitrations. Notwithstanding, other authors have recently pointed out the need to view investment treaty arbitrations from the host state's view point, in order to

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<sup>103</sup> See supra note 106.

<sup>104</sup> See Kingsbury, Krisch, and Stewart, supra note 34, on page 37.

<sup>105</sup> See, e.g., *Mobil v. Venezuela* (2010), supra note 57, on paragraph 87.

<sup>106</sup> See Alvarez, supra note 19, on page 46.

<sup>107</sup> See Section One: *Is there a need for an appellate system?* in F. Ortino, A. Sheppard, and H. Warner, *Investment Treaty Law – Current Issues Volume 1* (British Institute of International and Comparative Law, London 2006), pages 15 – 47.

reach or award a fair and equitable solution between host states and foreign investors.<sup>108</sup> However, a detailed analysis is yet to be conducted with regards to applying administrative law principles to ISTA as a mechanism that largely deals with regulatory disputes.

This gap in scholarly literature concerning the coexistence of administrative law principles, international investment law principles and ISTAs, highlights a need in legal practice and academia since ‘...a comparative public law framework... has not been well developed...’<sup>109</sup> in this area. For this reason, the main strategy of this research is to contribute a coherent and consistent analysis of this gap to academic debate and legal practice. As previously mentioned, this will help to improve and balance the relationship between host states and foreign investors.<sup>110</sup>

#### **e. Analytical Framework**

The idea of considering international regulatory disputes settled by means of ISTAs as similar to the legal remedies found in domestic administrative law may give rise to questions concerning; (i) the existence of this analogy; (ii) the contribution of this analogy to the understanding of ISTAs legal nature; and (iii) how the ‘appropriate’<sup>111</sup> applicable principles of law should be referred to, interpreted and applied by international arbitrators when dealing with international regulatory disputes. (See Annexes A and B)

Specific questions arise as to what extent, which way and why administrative law institutions and principles can be used as a reference to the analysis of international

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<sup>108</sup> See also Kingsbury and Schill, *supra* note 54, on pages 75 – 104.

<sup>109</sup> See, *supra* note 15, on page 28.

<sup>110</sup> See Muchlinski, *supra* note 41, on page 533; and Sornarajah, *supra* note 10, on page 355.

<sup>111</sup> See F. A. Mann, *Studies in International Law* (Clarendon Press, Oxford 1973), on page 241.

regulatory disputes. This is especially so considering the existing analogy between treaty-based regulatory disputes and some administrative law institutions and principles, such as domestic judicial review and other available legal remedies.

In this regard, an academic approach is taken. This academic approach uses as a reference those principles and institutions domestically developed through national laws and/or domestic cases, related to a similar kind of regulatory dispute between a host state and a private actor (including foreign investors). This approach is of academic interest as well as a practical professional tool.

Scholars, such as Professor R. Dolzer, have argued that the direct beneficiaries of IITs and ISTAs are foreign investors, since IIT and ISTA are mostly conceived to encourage and protect investors' interests.<sup>112</sup> However, others suggest that even though they see IITs and ISTAs as mechanisms that directly benefit the nationals of the contracting states, they consider that IITs are also conceived to protect the states' interests.<sup>113</sup>

With reference to this last argument, two issues arise: (i) concerning the conflict between the nature of foreign investment participation and the host state's public authority, as well as the protection of its public welfare and any eventual international legal dispute; and (ii) regarding which legal principles<sup>114</sup> should be applied to any eventual regulatory controversy by international arbitrators acting as temporary and 'special judges' with *ad hoc* competence on a state's public authority or regulatory power. In other words, it could be said that this process creates a kind of temporary

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<sup>112</sup> See Dolzer, *supra* note 48, on page 970; Weiler, *supra* note 33; and T. W. Wälde, and D. Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, Int'l L. J., Pages 215-267 (1996).

<sup>113</sup> See Sornarajah, *supra* note 77; S. D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, Fordham Law Review, Vol. 73, p. 1521 (2005) <[www.HeinOnline.com](http://www.HeinOnline.com)> (Last Visit 28/04/2009); Sornarajah, *supra* note 10; and Douglas, *supra* note 35, on pages 85.

<sup>114</sup> Taking into consideration that ever since the last half of the 20th century, the general principles of law have been taken into account in resolving legal *lacunas*. See Moles Caubet, *supra* note 55, on page 36.

‘supranational tribunal’. Within this context, it is why it has been said that ‘[d]epending upon how [arbitral tribunals interpret and apply] all areas of domestic law affecting foreign investment’, the international responsibility of the state will be more or less compromised.<sup>115</sup>

In the foregoing context, there are two critical considerations: the applicable principles chosen by the parties when they conclude a specific private contract (private law sphere) e.g., commercial acts; and the applicable principles to a specific state (investment) agreement (public law sphere) e.g., investment treaties. Thus, special consideration of the principles that are being applied to ISTAs by the international arbitrators should be given when deciding a case related to a regulatory dispute, especially since such a case would involve a review of matters of public policy of the host state in accordance with international standards of treatment, in particular with the FET standard,.

The comparative analysis of ISTAs with the French and British administrative legal systems, as the representatives of the two major legal systems of the Western world, brings more legitimacy to the present study. It also allows for the allocation of ISTAs within the respective state’s legal system. This exercise can be undertaken by assimilating these ISTAs which should be considered to be mechanisms that largely deal with international disputes within the domestic judicial review and applying legal remedies that a host state already has in place to deal with regulatory disputes with private actors.

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<sup>115</sup> See Dolzer, *supra* note 48, on page 964.



In this regard, it is important to highlight the existence of legal mechanisms that the host state has, such as administrative adjudication<sup>116</sup> (i.e., a dispute judged by public administration) and judicial review<sup>117</sup> (i.e., a dispute judged by a court). These two main models could offer a comparative view of the relevant and similar principles in these legal systems in relation to regulatory disputes, even though they may also have some different principles distinguishing them.

Related to this issue, common principles of administrative law that are based on the most important legal principle of public law, i.e., the ‘principle of legality’, can then be considered and applied to treaty-based regulatory disputes to reach or award a fair and equitable solution for the parties involved.

There are a variety of different principles that exist simultaneously within the French and British administrative legal systems which can be useful when dealing with an international legal dispute that encompasses the regulatory conduct of the host state. These principles include (i) the principle of legality; (ii) the principle of the public administration’s discretionary power; (iii) the principle of proportionality; (iv) the principle of legal certainty and legitimate expectations; (v) the principle of equality before the law; (vi) the principle of the public administration’s good faith; and (vii) the principle of the duty to give reasons, amongst others.

It can be stated that the coexistence and interaction between this set of domestic law principles and the set of principles of investment law represents a major task for public-law lawyers. For example, investment law principles in terms of fair and equitable treatment, national treatment as well as most-favoured-nation treatment seem to be

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<sup>116</sup> Ley de Protección al Consumidor y al Usuario (Venezuela); Ley Orgánica de Procedimientos Administrativos (Venezuela); Tribunals and Inquiries Act 1958; Tribunals and Inquiries Act 1992. Race Relations Act 1976 (UK); Equal Pay Act 1970 (UK); Administrative Procedure Act of 1976 (UK).

<sup>117</sup> Ley Orgánica del Tribunal Supremo de Justicia (Venezuela); Supreme Court Act 1981 (UK).

either in constant conflict or to be merely coexisting with those above-mentioned principles of domestic administrative law when the regulatory conduct of the state needs to be reviewed by investment arbitrators at the international level. Evidences of such conflict and peaceful coexistence can be found in the sample of more than forty cases used in Chapter V of this research. These cases largely concern situations where the legality of a state's regulatory conduct was under the scrutiny of the arbitrators and was examined against principles of investment law, in particular against the FET standard.

Another issue of relevance to consider are notions of administrative law that may vary between the French and British administrative legal systems. For example, in the Anglo-Saxon world, especially in Britain,<sup>118</sup> the notions of state, public law and public or general interests are different<sup>119</sup> from those which exist in the French legal system. These notions are the fundamental pillars of administrative law.<sup>120,121</sup>

With regard to public law, the principles applied to any legal dispute concerning the regulatory power of the state is judged in the British administrative legal system by

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<sup>118</sup> 'The absence of a written constitution affects the sources of constitutional law [known as the main source of Public Law]'. A. W. Bradley, and K. D. Ewing, Constitutional and Administrative Law (Fourteenth Edition, Pearson Longman, England 2007), on page 8.

<sup>119</sup> '... There is no precise demarcation between constitutional and administrative law in Britain.' Ibid., on page 10.

<sup>120</sup> According to Black's Law Dictionary (Eighth Edition) Thomson West, USA 2004, Administrative Law can be defined as 'the law governing the organization and operation of administrative agencies (including executive and independent agencies) and the relations of administrative agencies with the legislature, the executive, the judiciary, and the public. Administrative Law is divided into three parts: (1) the status endowing agencies with powers and establishing rules of substantive law relating to those powers; (2) the body of agency-made law, consisting of administrative rules, regulations, reports, opinions containing findings of fact, and orders; and (3) the legal principles governing the acts of public agents when those acts conflict with private rights.' (Emphasis added).

According to Professor H. Rondón de Sanso, Administrative law can be understood to be a set of norms related to the protection of public welfare by regulating the organization, functions, activities, means and resources which operate within an organization. See H. Rondón de Sanso, Teoría General de la Actividad Administrativa – Organización – Actos Internos (Librería Álvaro y Nora, Caracas-Venezuela 1995), on page 57.

<sup>121</sup> Administrative law governs public administration as a whole, e.g., at any level that there is an organization in place, including the executive, legislative and judicial branches which are responsible for the majority of administrative actions. See J. Vélez García, Los Dos Sistemas del Derecho Administrativo – Ensayo de Derecho Público Comparado (Institución Universitaria Sergio Arboleda, Colombia 1994), on page 32.

judges under ordinary jurisdiction, such as the jurisdiction used in civil and criminal cases.<sup>122</sup> However, in the French administrative legal system it is judged by ‘special judges’ and under a special jurisdiction known as ‘contentious-administrative jurisdiction’. Under the presumption of an equal legal status between a host state and a foreign investor in any jurisdiction, one may consider taking into account the influence of these two different approaches on the interpretation and application of the aforementioned institutions and principles to treaty-based regulatory disputes. Rather than being viewed as a dispute between two equal parties, ISTA as mechanism that largely deals with regulatory disputes should be treated as a unique forum which is part of the system of administration of justice of the state.<sup>123</sup>

Considering the various aspects of the two domestic legal systems and between these legal systems and investment law, questions may arise about (i) the institutions and principles that have been domestically developed and how they contribute to understanding some IIT provisions and international regulatory disputes; and (ii) how one could distil common principles that might be applicable to international regulatory disputes. Once again, the question may be asked: what rules and principles should be applied to an international regulatory dispute raised between a host state and a foreign investor?

Finally, this thesis contributes to the current debate by providing a comparative analytical framework of the common institutions and principles that have been developed domestically in the French and British administrative legal systems. This thesis addresses how those institutions deal with a comparable problem at the domestic level and how their approach can be of use in understanding and interpreting ISTAs

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<sup>122</sup> See Cane, *supra* note 42, pages 11-12.

<sup>123</sup> See Van Harten and Loughlin, *supra* note 7, on page 148.

features, which mainly deal with legal disputes regarding the exercise of the regulatory power of the state but at the international level.

#### **f. Methodology**

The present study is confined to considering legal issues arising from international regulatory disputes (see Annex A). For this reason, this study, through a legal research project, was designed to be undertaken by way of a comparative analysis of the legal institutions and principles of the French and British administrative legal systems. Emphasis must be placed on the fact that the French system is a part of the civil law tradition inspired by Romano-Germanic law and the British system is a part of the common law tradition inspired by English law. These are the two major legal systems that have been adopted in several countries as a legal heritage, especially in the Western world, in contrast to other legal traditions such as the Socialist and Islamic legal systems.

It is of equal importance to highlight here that when the present thesis refers to the French administrative legal system, it not only refers to the legal system in France, but also to other countries that have been influenced by it, such as Spain, Italy and the majority of Latin American countries. Similarly the British administrative legal system not only refers to the countries that form the United Kingdom, but it also refers to other countries that have been influenced by the common law tradition such as the United States of America, Australia, New Zealand, and Singapore, to name but a few.

The selection of these two systems relies on the influence that they have had on the idea of the public administration's legal institutions and rules, not only on the legal systems of their former colonies but on other legal systems as well. Here it is important

to stress that the legal complexities and details that form part of the above-mentioned administrative legal systems are excluded from this study to avoid a tedious thesis. This research has been conceived with the idea of providing the reader with a general picture of the main and most relevant characteristics and principles of both above-mentioned administrative legal systems.

Based on the comparative analysis, the present thesis also studies the influence that these systems have had on the way in which internal regulatory disputes are resolved. The importance of this comparative analysis relies on the fact that the administrative practice and judge-made law must also be taken into consideration due to the similarity between the institutions, characteristics and principles of these systems with the ISTA which are considered to be mechanisms that largely deal with international disputes . In this particular case, this kind of regulatory dispute (as a mechanism to ascertain the existence of a legal duty or right at the national or international level) can be used as grounds for the protection of, and to guarantee, the principles of justice.

In this comparative analysis, the task is facilitated by the identification and study of the common institutions and principles that fall within the scope and assessment of this study. The main aim of this comparative analysis is to understand how these institutions and principles might work together and produce similar effects in different jurisdictions, in particular to treaty-based regulatory disputes. By means of this comparative analysis, issues related to the exercise of a host state's regulatory power, the settlement of domestic regulatory disputes provide the elements by which the function and practice of the current ISTA system can be better understood.

The examination of this study is based on three themes:

- (i) A comparative analysis of the most common institutions and principles related to the exercise of regulatory authority by the host state that have been developed domestically and exist in the French and British systems (considering their long historical tradition) in order to identify the common institutions and principles that are being used and applied by states in any internal regulatory dispute (Chapter II);
- (ii) A comparative analysis of IITs and ISTAs as a mechanism that is increasingly used to judge the host state's regulatory conduct at the international level. The main purpose of this part is to identify the principles and characteristics that have been developed in the international arena and have been used mainly to settle regulatory disputes between host states and foreign investors. The author believes that it will help to emphasize the consequently 'unbalanced' outcome that might have existed between them as a result of a conceptually-flawed framework adopted by the arbitral tribunals (i.e., the misconception of investment arbitration as a commercial dispute rather than implicating the public law function of the host state or regulatory dispute) (Chapters III and IV) ; and,
- (iii) Finally, a review of arbitral practice and deductive reflection framework are built on those common principles of administrative law and investment law that can coexist or conflict in the application of ISTAs as a mechanism that considerably deals with the governmental conduct of the host state at the international level (Chapters V and VI).

The documents analyzed in this research include both national and international legal instruments currently in force in the French and British administrative legal systems, as

well as those in force in other countries such as America, Venezuela, Ecuador, and Bolivia. The principles that have been developed by scholarly literature as well as the principles that have been underscored by arbitral awards have also been used for this purpose.

As mentioned above, all these documents, as well as this research, are analyzed from the perspective of the exercise of host-state public authority, with special emphasis on the regulation of economic activities. The relevant scholarly literature was reviewed with the idea of discarding unnecessary details (a typical characteristic of public law books) to avoid making the present research repetitive and irrelevant. In fact, the wording of this study has been drafted with the intention of creating a doctoral thesis using simple language. The author is aware that it is almost impossible to address all aspects of this complicated topic in a 300-page document.

#### **g. Structure**

The thesis has been divided into three main areas of research. The first area is developed by Chapter II, which has been designed as a general introduction to the research topic in order to provide background information on differences and similarities between the French and British constitutional and administrative legal systems. The main purpose of this comparative study is to establish the fundamental institutions and principles that exist in these two systems and which govern the public administration and its regulatory power. It also contains a description of internal legal mechanisms that are domestically used to settle regulatory disputes between public administration and private actors. Finally, the research results in a comparative analysis of the principles that have been developed domestically and are currently applied by states in their domestic administrative law systems.

The second area of this research is addressed by Chapters III and IV. Chapter III provides a conceptual framework of IITs that allows for the identification of their main features as well as their adoption within the classical sources of the public international law. In this respect, a theoretical and specific framework is also constructed on those substantive principles of international investment law in order to create common ground between the previous chapter, the present chapter and the following one in terms of analysing the area under review. This elaboration focuses on the use of administrative law principles and substantive principles of international investment law by international arbitrators, considering the current expansion of investment arbitration as a kind of public law adjudication.

Chapter IV provides a critical assessment of investment treaty arbitrations as (i) a common juridical arena that largely resolves core questions of public law and policy; and (ii) as a means of increasing their use as a kind of public law adjudication. The analytical assessment enriches the current debate on the public law nature of the ISTAs as a mechanism that mostly deals with international regulatory disputes, balancing the two different approaches (states' and investors' points of views), that are the object of study currently. Special consideration is given to the role that the consent of the state to arbitrate as well as its role in the different stages of the arbitration process in determining the mechanism of enforcement. An assessment is also undertaken on the political-socio-economic causes of investment disputes in order to introduce a factual basis that will certainly enrich the present research.

The third area of this study is addressed in Chapters V and VI. Chapter V provides a descriptive chapter on how arbitral tribunals have dealt with regulatory issues at the international level. Chapter V includes an arbitral practice review, the main objective of



which is the assessment of arbitral awards to identify factual situations that can be deemed to fall under the scope of the administrative law principles identified in Chapter II. Here, the interrelation between investment treaty arbitration and principles of international law and administrative law regarding investment and the exercise of a state's public authority and regulatory power are addressed. This chapter puts the ideas that were theoretically discussed in the previous chapters into practice.

Chapter VI encourages a reflective framework on the current investor-state treaty arbitration system and the possibility of applying administrative law principles to this system. This chapter mainly covers those political, international and academic concerns that have surfaced in relation to the alleged legitimacy crisis this arbitration system is facing. The chapter continues with providing an idea of how to minimize and avoid the imbalance in the relationship between states and investors. Finally, this chapter introduces some temporary solutions to the legitimacy crisis as the best way of imparting justice and protecting the state of law at both the national and international levels.

At the end of each chapter, a separate summary has been provided to link one chapter with another in the interest of guiding and providing the reader with continuity, thus giving a consolidated and comprehensive understanding of the study.

Finally, Chapter VII, the concluding chapter of this research, has been divided into two sections. The first section sets out the summary of the problem, main findings and conclusions from the exercise carried out in the previous chapters; and the second section provides the main contribution, limitations, further research and a final reflection upon the topic.

## CHAPTER II

### INSTITUTIONS AND PRINCIPLES OF ADMINISTRATIVE LAW – A COMPARATIVE ANALYSIS BETWEEN FRENCH AND BRITISH ADMINISTRATIVE LEGAL SYSTEMS.

#### a. Introduction

Since the Peace of Westphalia in 1648,<sup>1</sup> the notion of the state power (sovereignty), its role as ‘an organization whose main objective is to ensure the pacific coexistence of its people’, and, its role as the guardian of its peoples’ rights, has been a highly debated issue in the public-law sphere. In addition to this it has also been the subject of constant discussion and scrutiny by its national and foreign inhabitants.<sup>2</sup>

A special concern is the exercise of a state’s powers and functions<sup>3</sup> and the coexistence of these powers and functions with the fulfilment and accomplishment of a state’s aims. This is particularly so within the context of promoting and protecting a state’s social objectives which results in a *prima facie* improvement in national welfare.<sup>4</sup>

It has been pointed out that the continuous internal political battles between the social-economic aspects of the state as guarantor of its peoples welfare and of the state’s burden of generating economic income to build a wealthy national economy, have

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<sup>1</sup> See T. Hobbes, *Leviathan* (Revised Student Edition, Cambridge University Press, UK 2002).

<sup>2</sup> M. García-Pelayo, *Derecho Constitucional* (Quinta Edición, Colección Textos Jurídicos Universitarios, Manuales de la Revista de Occidente, Madrid), on page 19. See also F. J. Goodnow, *Comparative Administrative Law* (Volume I, Bibliobazaar, G.P. Putman’s Sons, New York – London, 1897), on page 3.

<sup>3</sup> In this regard, it has been suggested that the state only has one juridical personality. For more details, see J. Vélez García, *Los Dos Sistemas del Derecho Administrativo – Ensayo de Derecho Publico Comparado* (Institución Universitaria Sergio Arboleda, Colombia 1994), pages 30-31.

<sup>4</sup> Professor Brewer Carias has identified the various aims of a Contemporary State; (i) aims in policy and general administration; (ii) aims in economic growth; (iii) aims in social development; and (iv) aims in structural development and territorial management. See A. R. Brewer Carias, *Estudios de Derecho Publico – Tomo I* (3ª Edición, Ediciones de la Facultad de Ciencias Jurídicas y Políticas de la Universidad de Central de Venezuela, Caracas, Venezuela 1984), pages 129-142. See also R. Scott, and P. B. Stephan, *The Limits of Leviathan – Contract Theory and the Enforcement of International Law* (Cambridge University Press, UK 2006), on page 30.

given rise to the need to continuously adopt new regulations to guarantee transparent relationships between the state and individuals and economic stability.<sup>5</sup>

Accomplishing such a level of transparency and economic stability requires that the aims of the state and its future plans and activities are clearly identified and reviewed constantly.<sup>6</sup> In relation to the latter point, scholarly literature has classified and divided the activities of the state into functions (i.e., functions or powers of the state).<sup>7</sup>

These functions or powers of the state are divided – based on the Montesquieu doctrine<sup>8</sup> – into three major functions: the legislative function (i.e., ‘law-making’, being the creation, amendment or repealing of the law);<sup>9</sup> the judicial function (i.e., ‘law-adjudicating’, being the hearing and decision of justiciable cases as well as interpretation and enforcement or avoidance of the law);<sup>10</sup> and the executive function (i.e., ‘law-executing’, being the sole authority and responsibility to administer – in accordance with the law – the state bureaucracy known as public administration).<sup>11</sup>

Nonetheless, as far as this research is concerned, it is of the utmost importance to highlight that the attainment of state aims is mainly achieved through the government (i.e., the executive power including its public administration power) and its ‘governmental acts’<sup>12</sup> (i.e., the public administration actions), which convert state

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<sup>5</sup> See Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009 <[http://www.thedti.gov.za/ads/bi-lateral\\_policy.pdf](http://www.thedti.gov.za/ads/bi-lateral_policy.pdf)> (Last visit 03/10/2009).

<sup>6</sup> Professor R. Dolzer, *Presentation on Lex Petrolea*, Seminar on Dispute Resolution in the International Oil & Gas Business – plus a special session on Boundary Disputes in the Energy Sector (organized by ICDR and AIPN), 19-21 April 2010, Houston, Texas.

<sup>7</sup> See Vélez García, *supra* note 3, on page 197.

<sup>8</sup> It has been said that the doctrine of separation and limitation of powers of the state was a lesson that Montesquieu learned from the English philosopher John Locke who had declared there to be a separation of state powers, such as the legislative power and the executive power. John Locke perceived the separation of powers to reduce the absolutism which reigned in those days. See Vélez García, *supra* note 3, pages 394-395.

<sup>9</sup> Black’s Law Dictionary (Eighth Edition) Thomson West, USA 2004.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> In the context of this thesis ‘governmental acts’ refers to the meaning of ‘administrative acts’. See A. Moles Caubet, *El Principio de Legalidad y sus Implicaciones* (Publicaciones del Instituto de Derecho Público,

conduct into a physical and tangible reality.<sup>13</sup> Appreciation of these physical and tangible state actions are demonstrated and compiled through the dynamic branch of public law titled ‘administrative law’, whose official birth goes back to the nineteenth century, in France.<sup>14</sup>

The essence of administrative law, as a fundamental governing feature of any administrative legal system, goes beyond the simple regulations of the relationships between the organs of the state. It also applies to the interaction between public administration and private individuals, which has become known in France as ‘*la transparence de l’administration*’ (administrative transparency).<sup>15</sup>

Indeed, administrative law, as a branch of public-law that helps to embody the spirit of public administration, gives effect to the principle enshrined in the Montesquieu doctrine, relating to the separation of state functions (powers) and consequently their limitation, in particular by protecting the individual’s rights from the abuse of power by the state. In this regard, it is of special importance to introduce and emphasize the statement made by Leon Duguit, which states that ‘the reality of the state is none other than the relationship between rulers and governed citizens’.<sup>16</sup>

As far as the present study is concerned, this relationship between the public administration and private individuals cannot be understood without taking into

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Facultad de Derecho, Universidad Central de Venezuela, Caracas – Venezuela 1974), pages 25-28. See also A. W. Bradley, and K. D. Ewing, Constitutional and Administrative Law (Fourteenth Edition, Pearson Longman, England 2007), on page 259; and L. Neville Brown, and J. Bell, French Administrative Law (Fifth Edition, Oxford University Press, UK 2003), pages 138-139.

<sup>13</sup> See Goodnow, *supra* note 2, on pages 1, 4 and 5; and Vélez García, *supra* note 3, on page 198.

<sup>14</sup> See Bradley and Ewing, *supra* note 12, on page 725. See also Blanco’s decision (TC 8 February 1873), quoted by Neville Brown and Bell, *supra* note 12, on page 5.

<sup>15</sup> See Neville Brown and Bell, *supra* note 12, on page 30.

<sup>16</sup> See Vélez García, *supra* note 3, on page 181.

consideration the most relevant institutions and principles of domestic public law, which form the foundation of state rules regarding natural justice.<sup>17</sup>

The best way to become familiar with these principles (from the author's point of view) is by comparing the major administrative legal systems of the world which are, for the purposes of this study, the French and British legal systems as they are the incontestable origins of the two main legal traditions of the world (namely the civil and common law traditions).

Throughout this comparison, one is able to identify and understand the institutions and principles that have had – either directly or indirectly – juridical influence on other legal systems of the world. In this context, it has been said that ‘the development of a certain legal system could be conducted by learning from another legal systems’.<sup>18</sup>

In brief, this chapter will identify, describe and compare the common institutions and principles of domestic public law applicable to both the French and British administrative legal systems. Special reflection will be given to constitutional and administrative laws and to those institutions and principles that are related to the interaction between the state (through the exercise of its public administration) and private individuals; encompassing those principles applicable to their relationships and controversies.

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<sup>17</sup> See P. Cane, *Administrative Law* (Fourth Edition, Oxford University Press, UK 2004), on page 134. See also Bradley and Ewing, *supra* note 12, pages 206-216.

<sup>18</sup> D. Barak-Erez, *The Institutional Aspects of Comparative Law* 15 Colum. J. Eur. L. 477 (2008-2009), on page 478.

## **b. A preliminary remark**

### **i. Main legal systems**

It is important to emphasize that the different types of legal systems around the world have played a crucial part in the historical development of legal principles within the major legal systems of the world.<sup>19</sup>

These legal systems mainly fall within three different types of legal traditions:<sup>20</sup> (i) the civil law tradition (i.e., a derivation of the ancient Roman law which is primarily codified law); (ii) the common law tradition (i.e., a creation of the early centralisation of the courts in England by Henry II which is still predominantly case law); and; (iii) the socialist law tradition (i.e., also a codified system but based on Marxist-Leninist ideas of the fundamental principal of ‘from each according to his ability, to each according to his needs’).<sup>21</sup> Nonetheless, there are other equally important legal systems in the world, such as Islamic law and Communist law, however they are less relevant to the current study.

Within this context, it can be stated that the French administrative law system is one of the most significant representatives of the civil law tradition, in the same way that the British administrative law system acts as a representative of the common law tradition. These two main legal systems were exported to other countries either by the free

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<sup>19</sup> C. Elliott, E. Jeanpierre, and C. Vernon, French Legal System (Second Edition, Pearson Longman, England 2006), on page 1. See also H. Patrick Glenn, Legal Traditions of the World (Fourth Edition, Oxford University Press, UK 2010).

<sup>20</sup> For more details about the differences between ‘legal families’ and ‘legal traditions’; see P. De Cruz, A Modern Approach to Comparative Law (Kluwer, Deventer – Boston 1993), pages 27-40. See also J. H. Merryman, La Tradición Jurídica Romano-Canónica (Fondo de Cultura Económica, México 2008), on pages 15-23; and C. B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction* 41 Vand. J. Transnat'l L. 1083 (2008).

<sup>21</sup> See De Cruz, *supra* note 20, on page 27.

adoption of the system or by its imposition on the former colonies during the time of conquest.

ii. The importance of adopting these legal systems

One of the most important reasons for drawing attention to the classification of legal systems is based on the idea that they are beginning to merge at a balancing point using cases and codes. This is despite the fact that civil law still relies on principles established by a statute; and the common law seems to rely on the case law mechanism.<sup>22</sup>

However, in terms of this research, it is necessary to draw attention to the fact that, due to the uncodified nature of the dynamic administrative law under both respective systems, principles of administrative law have been developed through the case law of both systems. This is a common element which can be of interest for the development and cross-fertilization of principles of one system into another.

With this mind, it is necessary to readdress the idea that '[Despite the fact that] legal systems have the same basic [administrative] problems and solve them by quite different mechanisms; they very often arrive at similar results'.<sup>23</sup> Here, it is of crucial importance to point out that despite the fact that these legal systems have different mechanisms, in order to seek a solution to specific legal situation, they may also use different approaches to solve legal problems. The inquisitorial and adversarial procedures that exist within civil and common law traditions, respectively, serve to be

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<sup>22</sup> The process of codification means 'the settling down of rules of existing law, in a comprehensive and ordered form and the approval of the resulting text by a law-determining agency'. I. Brownlie, Principles of Public International Law (Seventh Edition, Oxford University Press, Oxford 2008), on page 29.

<sup>23</sup> See De Cruz, *supra* note 20, on page 37; B. Schwartz, French Administrative Law and the Common-Law World (New York University Press, New Jersey 2006), on page 113; and Patrick Glenn, *supra* note 19.

an illustration of this.<sup>24</sup> Similarly, it has been also pointed out<sup>25</sup> that the teleological method used in the civil law system and the literal method used in the common law system may also affect the outcomes of a legal debate.<sup>26</sup> In any case, with regard to this, it may be assumed that these different approaches may produce solutions having different outcomes that can be used as precedent or as a principle in administrative law practices in later cases. As a result of applying such different approaches the responsibility of the state may be compromised.<sup>27</sup>

Within these main legal traditions, it is imperative to consider the notion of ‘general principles of law’ since they may differ in each legal system.<sup>28</sup> In particular, the emerging process of cross fertilization of these principles may consequently encourage all legal systems to be focused on the idea of state transparency in order to safeguard the essential principles of individual rights, such as the right to life, freedom and property.<sup>29</sup>

One key aspect, from a legal view point, is – as emphasized above – the exportation of legal principles from one legal system to another, which has been happening since the era of colonisation, and is now being adapted to local conditions (i.e., the production of plurality of laws).<sup>30</sup>

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<sup>24</sup> See Merryman, *supra* note 20, pages 80-95; Schwartz, *supra* note 23, pages 132-135; and Picker, *supra* note 20, pages 1127-1130.

<sup>25</sup> T. W. Wälde, *Interpreting Investment Treaties: Experiences and Examples* in Reinisch *et. al.*, *The Future of International Investment Law*, Pages 724-781 (2009), on page 746. See also Brownlie, *supra* note 22, pages 635-636; and, F. G. Jacobs, and S. Roberts, *The Effect of Treaties in Domestic Law* (United Kingdom National Committee of Comparative Law, Sweet & Maxwell, London 1987), pages 55-55.

<sup>26</sup> Special consideration should be given to A. W. Bradley’s argument that the fact that ‘British membership to the European Union directly affects our [British] approaches to interpretation, since in most European legal systems the methods of legislative drafting and the rules of statutory interpretation are very different to those in Britain’. See Bradley and Ewing, *supra* note 12, pages 18-19; and Picker, *supra* note 20, pages 1088-1089.

<sup>27</sup> See Picker, *supra* note 20, on page 1088.

<sup>28</sup> See Neville Brown and Bell, *supra* note 12, on page 304.

<sup>29</sup> See A. E. Pérez Luno, *Los Derechos Fundamentales* (Novena Edition, Temas Clave de la Constitución Española, Tecnos, Madrid, 2007). See also Bradley and Ewing, *supra* note 12, on page 675.

<sup>30</sup> See De Cruz, *supra* note 20, on page 31. See also Merryman, *supra* note 20; G. Shalev, *Administrative Contracts* 14 Isr. L. Rev. 444 (1979); H. Mairal, *Government Contracts under Argentine Law: A Comparative*



One vivid and current illustration of this can be found in the influence of the jurisprudence of the European Court of Justice (ECJ). Legal principles developed in the decisions of the ECJ and of European Court of Human Rights (ECtHR) have also been adopted by the member states.<sup>31</sup> Another example of this level of influence can be found in the principles developed by the French Civil Code of 1804 which were then adapted by the countries of Continental Europe and subsequently, by former European colonies.<sup>32</sup> Furthermore, a similar situation applies to those principles from the common law tradition, such as the centralisation of the courts and case law in England, which were also exported to the former British colonies during the existence of the British Empire.

In brief, despite the adoption or influence of foreign legal principles in a given legal system, there is a common problem related to these above-mentioned legal systems. This is basically summarised by Professor H. W. R. Wade when he presents his concern as to ‘how... the power is governed by law’, i.e., the principle of the ‘rule of law’ which is a legacy of the English and French revolutions in the seventeenth and eighteenth centuries.<sup>33</sup>

In this context, the best manner to understand a given legal system and its influence on legal systems of other countries is through the analysis of their constitutional law framework. This framework establishes the minimum basis of any democratic society and its state of law.

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*Overview* 26 Fordham Int’l L.J. 1716 (2002-2003); and, G. Langrod, *Administrative Contracts* 4 Am. J. Comp. L 325 (1955).

<sup>31</sup> See Elliott, Jeanpierre and Vernon, *supra* note 19, on page 79.

<sup>32</sup> The French legal system has been based on: (i) the Civil Code of 1804; and (ii) the Council of State which was created to control the governmental conduct. See Elliott, Jeanpierre and Vernon, *supra* note 19, on page 5; and Mairal, *supra* note 30, on page 1717.

<sup>33</sup> Professor H. W. R. Wade quoted by Neville Brown and Bell, *supra* note 12, on page 1. See also Bradley and Ewing, *supra* note 12, pages 93-106.

### c. Constitutional legal system

As a foundation of any administrative legal system, there should be a constitutional legal system, with a constitution either in written or an unwritten form.<sup>34</sup> This constitutional legal system establishes the framework and foundations of the existence of a state of law.<sup>35</sup> Traditionally, this legal regime is carried out through the law contained within the constitution. This law may either be a rigidly enacted law (e.g., as in France) or a loosely enacted law (e.g., as in the United Kingdom). The constitutional regime of a state reflects its structure as well as provides a vivid expression of its juridical and political order.<sup>36</sup>

Furthermore, it also could perhaps be a reflection of the legal tension that may exist between the norms and the reality of the said state since it basically provides the fundamental principles that govern the state, its structure and powers (i.e., the fundamental law<sup>37</sup>).<sup>38</sup>

In this regard, it also separates the norms into acts by right of dominion that belong to a state known as *Acta Jure Imperii* (i.e., sovereignty/acts of authority) and in acts by right of management that belong to a state known as *Acta Jure Gestionis* (i.e., private law acts of public administration/commercial acts).

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<sup>34</sup> As already mentioned, it has been argued that constitutional regimes were conceived to determine the clear division, function and limit of the state's powers in opposition to the absolutism exercised by the monarch until the eighteenth century. See García-Pelayo, *supra* note 2, on page 27. Basically, it has been asserted that the constitutional regime took place 'as a result of the American and French revolutions'. See also Bradley and Ewing, *supra* note 12, on page 5.

<sup>35</sup> M. Loughlin, *The Idea of Public Law* (Oxford University Press, UK, 2004), on page 20.

<sup>36</sup> See García-Pelayo, *supra* note 2, on page 22.

<sup>37</sup> The origin of this term seems to emanate from France. It was used in England under the reign of Henry VIII as a mechanism to address and resolve political frictions between the King and parliament. Nonetheless, the meaning of this term still refers to the inviolability of the constitutional norms and to the existence of the state itself. See García-Pelayo, *supra* note 2, on page 25.

<sup>38</sup> *Ibid.*, on page 382.

It is within this context that, L. Neville and J. H. Bell stated that ‘the understanding of the constitutional history of the country can help to have a better appreciation of the administrative law and its divergence with the other branches of law such as civil law’.

Constitutional law is nevertheless defined according to K. C. Wheare as ‘the whole system of government of a country, the collection of rules which establish and regulate or govern the government’.<sup>39</sup>

These statements infer a common legal principle that exists between the French and British constitutional systems, despite their different legal origins and constructions. This common legal principle is the *principle of delegated legislation*, which is granted to the executive branch of government by parliament as a representative of the will of the nation. This power is granted with the idea of providing the administration with powers to regulate (through rule-making authorities as administrative acts) upon specified circumstances (known as secondary or subordinate legislation or delegated regulatory power of public administration).<sup>40</sup>

This delegated regulatory power also determines to some extent the validity of the act of public administration which must be performed within the principles within the constitutional regime, i.e., the principle of legality mainly. In fact, transgressions against this principle can consequently be adjudicated by the ‘respective judge’.<sup>41</sup>

Moreover, it is also necessary to point out here that despite the fact that legislative acts are the immediate execution of principles established by the constitutional regime, it has been said that the judicial and executive powers, respectively, are equivalent to the

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<sup>39</sup> K. C. Wheare; quoted by Bradley and Ewing, *supra* note 12, on page 4.

<sup>40</sup> The British system ‘is founded partly on acts of parliament and judicial decisions, and partly on political practice and partly upon their own activities’ See Bradley and Ewing, *supra* note 12, pages 4 and 674.

<sup>41</sup> See Neville Brown and Bell, *supra* note 12, on page 220.

immediate enforcement and better development of legislation. Consequently this prompts the fulfilment of constitutional principles (such as those relating to the Magna Carta).<sup>42</sup> It may be considered that the spirit of the constitutional regime is to make sure that the principles are adhered to in order to prevent abuse, for example by the arbitrary use of a certain power.<sup>43</sup>

As J. Velez Garcia pointed out, the distribution of powers within a state does not seek their equalization. Conversely, this equilibrium seems to be exercised, as mentioned above, by the executive (government).<sup>44</sup> This distribution of powers represents a limitation of competences between each power. This limitation is governed by principles of law.<sup>45</sup> The limitation and judicial control of executive power within the constitutional regime, either through special jurisdiction<sup>46</sup>, as in France, or through ordinary jurisdiction, as in the United Kingdom, is governed by legal principles duly recognized by all (civilized) nations.<sup>47</sup>

One of the reasons for this limitation and judicial control is based on the need to annul the aggrieving act or compensate the potential aggrieved individual. Under these circumstances, various legal mechanisms in the respective legal systems are relied upon.<sup>48</sup>

In summary, it can be said that both the French and British constitutional systems: (i) define and limit the government's structure and powers; (ii) establish the foundation for

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<sup>42</sup> See Vélez García, *supra* note 3, on page 201. See also B. Z. Tamanaha, On the Rule of Law – History, Politics, Theory (Cambridge University Press, UK 2004), pages 25-27

<sup>43</sup> See Vélez García, *supra* note 3, on page 330.

<sup>44</sup> *Ibid.*, on page 413.

<sup>45</sup> *Ibid.*, on page 410.

<sup>46</sup> Despite the fact that in France the contentious-administrative jurisdiction is entrusted to the French Council of State, which is part of the executive power, in the majority of the states, which have been influenced by the French administrative legal system, the contentious-administrative jurisdiction is part of the judicial power.

<sup>47</sup> Article 38 of the Statute of the International Court of Justice (ICJ); quoted by Picker, *supra* note 20, on page 1092.

<sup>48</sup> See Neville Brown and Bell, *supra* note 12.

a relationship between the state and the individual; and (iii) guarantee the fundamental rights of individuals.<sup>49</sup>

#### i. The Constitution: division of powers

As was mentioned above, any constitutional legal system basically reflects an organic and functional structure in which ‘a state is subject to law’ and ‘the role of law and government in society’<sup>50</sup> represents the centre of gravity. That is, that constitutional mandates have supreme and effective validity over the ‘regular’ laws of parliament (statutory law) and regulations and acts of public administration (administrative acts).<sup>51</sup>

The day-to-day activity of the state (i.e., government), under both the French and British legal systems, is performed by the executive branch, which is carried out by the public administration.<sup>52</sup> Despite the task facing the public administration, it is not easy for the public administration to coexist with other powers or functions of the state.

As already mentioned, the classical division of powers (i.e., legislative, judicial and executive powers) of the state was first established by the Montesquieu doctrine. These separations of powers are mainly found in a constitutional legal system, and interestingly, there has been constant shifting between these powers.<sup>53</sup>

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<sup>49</sup> Case *Marbury v. Madison* (1803). Quoted by Vélez García, supra note 3, on page 339.

<sup>50</sup> See Bradley and Ewing, supra note 12, on page 3. See also García-Pelayo, supra note 2.

<sup>51</sup> The term ‘regular’ has been introduced in order to distinguish those acts of the British Parliament which are enforced as one the legal foundations of British Constitutionalism from those acts which are enforced to develop constitutional principles. See Bradley and Ewing, supra note 12, on page 681. See also Vélez García, supra note 3, on page 337.

<sup>52</sup> The exercise of day-to-day state activities has been met with certain reservations and concerns due to legal vestiges left by famous monarchical practices such as ‘l’état, c’est moi’ (‘I am the State’) in France and ‘the King can do no wrong’ in England. See Schwartz, supra note 23, pages 266-268. See also Vélez García, supra note 3, on page 413. See also Bradley and Ewing, supra note 12, on page 7.

<sup>53</sup> It is important to point out that such a division of state power was not produced in ‘clear separation’ as J. Velez Garcia argued because the Montesquieu’s Doctrine did not adhere to any judicial technique. This doctrine was inspired by the desire to preserve the rights and freedoms of individuals, that were being compromised by the absolutist or authoritarian state which was often confused with the monarch, as the monarch was the supreme legislator, executor and judge. See Vélez García, supra note 3, on page 202. See also García-Pelayo, supra note 2, pages 154-155.

A specific concern has emerged in the infinite political debate regarding ‘the cohabitation’<sup>54</sup> and the supremacy of one power over the other. This can be seen, for example, in the competing importance of doctrines such as the doctrines of ‘supremacy of the administration’;<sup>55</sup> of ‘judicial supremacy’<sup>56</sup> or of ‘supremacy of the parliament’.<sup>57</sup>

Additionally, there is a concern about preserving the correct functions of these institutions by trying to avoid the overlap of their functions and by trying to conserve each institution’s function in its proper place.<sup>58</sup> Nevertheless, the main idea behind this concern is to avoid ‘a concentration of power in the hands of any organ of government’, despite the fact that the significance of the separation of powers is often minimised.<sup>59</sup>

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<sup>54</sup> Ibid., pages 23-25.

<sup>55</sup> This principle consists of the superior relationship that the public administration has with private individuals. See H. Rondon de Sanso in *Teoría General de la Actividad Administrativa* (Hildegard Rondon de Sanso, Caracas 1995), pages 43-77.

<sup>56</sup> This principle is based on *Marbury v. Madison* (1803) which established the supremacy of the American Supreme Court of Justice with regard to any conflict between the constitution and legislation. See Vélez García, *supra* note 3, on page 413. See also W. F. Fox, *Understanding Administrative Law* (Second Edition, Legal Text Series, Matthew Bender & Co., Inc. New York 1992), pages 33-37.

<sup>57</sup> This is defined by A. W. Bradley as ‘a rule which governs the relationship between the courts and the legislature, namely that the courts are under the duty to apply the legislation made by Parliament and may not hold an act of Parliament to be invalid or unconstitutional’. Nonetheless, one of the problems of this principle is due to the fact that ‘the absence of a written constitution [in the United Kingdom] is widely considered to make it difficult and even impossible for the courts to be entrusted with the protection of such rights against legislation by Parliament.’ See Bradley and Ewing, *supra* note 12, on pages 7 and 55.

On the other hand, under the French legal system, at the moment of constituting the fifth republic, one of the main concerns of General de Gaulle and the old parliament was to clearly separate the executive power (i.e., the President of the Republic) from the legislative power in order to avoid any overlap between both powers (General de Gaulle’s speech, on 16 June 1946). See Elliott, Jeanpierre and Vernon, *supra* note 19, on page 18.

<sup>58</sup> One reason for this overlap can be found in the explanation given by A. W. Bradley which states ‘[i]n considering these aspects of separation, it needs to be remembered that complete separation of powers is possible neither in theory nor in practice.’ See Bradley and Ewing, *supra* note 12, on page 87. See also García-Pelayo, *supra* note 2, on page 156

<sup>59</sup> See Bradley and Ewing, *supra* note 12, on page 81.

## ii. Objectives, fundamental rights and guarantees

Modern constitutionalism would not exist without fundamental rights and guarantees which basically determine the basis of ‘the state of law’.<sup>60</sup> Most of these primary fundamental rights and guarantees (i.e., equality; freedom of conscience; belief, association and expression; the presumption of innocence, amongst other) originated from the Declaration of the Rights of Man and of the Citizen of 21 August 1789.<sup>61</sup>

The main objective of constitutionalism – apart from delineating the states philosophy on its internal organization as well as that defining the general parameters – is to safeguard people’s rights and the state’s structure.<sup>62</sup> In this regard, it has been said that ‘fundamental rights cannot be overridden by general or ambiguous words’.<sup>63</sup>

Additionally, modern constitutionalism and fundamental rights and guarantees have a double function. The subjective function is mainly to act as a guarantee to individual rights; and, the objective function amounts to the fulfilment of the states aims, which are established or embodied within the constitutional regime.<sup>64</sup> These two functions also guarantee the existence of ‘the state of law’, which is based on the existence of the fundamental rights and guarantees. It has been argued that when the operation of the ‘rule of law’ is more rigorous, the level of protection afforded to the fundamental rights and guarantees is greater.<sup>65</sup> Nevertheless, it is important to stress that even in the most ‘perfect’ legal framework and ‘rule of law’, there may exit continual infringements and violations of fundamental rights and guarantees.

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<sup>60</sup> See, e.g., Loughlin, *supra* note 35, on page 114.

<sup>61</sup> See Elliott, Jeanpierre and Vernon, *supra* note 19, on page 4.

<sup>62</sup> See Loughlin, *supra* note 35, on page 69.

<sup>63</sup> See Bradley and Ewing, *supra* note 12, on page 18.

<sup>64</sup> See Pérez Luno, *supra* note 29, on page 25.

<sup>65</sup> *Ibid.*, on page 26.

In this respect, under both the French and British legal systems, a common element is the state's arbitrariness or abuse of power to the detriment of such rights and guarantees belonging to private individuals. This kind of state administrative action can be provoked either by the exercise of state objectives (i.e., the protection of the public interest) or by the exacerbation of economic objectives (i.e., the reclamation of the rights acquired).<sup>66</sup> These rights and guarantees are normally grouped into: personal, civil, political, economic, social, and cultural rights.

The majority of these principles and rights have been subjected, in one way or another, to certain legal limitations (mainly through delegated legislation) in order to guarantee the coexistence of both the private individual's rights and the protection of the national welfare (i.e., as a mechanism to balance the individualist and collectivist approaches).<sup>67</sup>

In summary, as will be seen later, there are legal mechanisms in place, (i.e., regulatory, jurisdictional, and institutional guarantees) to protect the individual's rights from the abuse of state power. These legal mechanisms or guarantees are thought to protect and enforce these principles, and the rights have been mainly entrusted to the courts.<sup>68</sup> The exercise or protection of these fundamental rights has also been entrusted to public administration to act as a guarantor of the state of law in a given society. This administrative function is summarized in the following sub-section.

#### **d. Administrative legal system, public administration and public authority**

Traditionally, constitutionalism is completed and extended, as previously mentioned, by the branch of public law known as 'administrative law' since this branch of law

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<sup>66</sup> Ibid., on page 26.

<sup>67</sup> This idea has been taken from the argument based on the transition from a liberal state to a social state of law, which has been mainly inspired by Germanic Constitution of Weimar of 1919. See Bradley and Ewing, *supra* note 12, on page 39.

<sup>68</sup> Ibid., on page 7.



develops those principles embodied in the constitution, in a detailed manner.<sup>69</sup> Such development is achieved through what is known as the ‘administrative legal system’.<sup>70</sup>

This system exists, in one way or another, within every state structure. Although each state structure has its own unique characteristics and problems, ultimately, they each have the same final social aims and results: the protection of the national welfare.<sup>71</sup>

This ‘administrative legal system’ is not exclusive to only one legal system, i.e., the French administrative legal system;<sup>72</sup> it also refers to parallels evident in the British administrative legal system.<sup>73</sup>

A common feature of both the French and British administrative law systems is that the state or the Crown, through its domestic public law and in most cases through the ‘administrative law’ branch, achieves the fulfilment of social aims in order to fulfil its mission of protecting its national welfare.

The role of the ‘administrative legal system’ as ‘the honest man that must behave properly towards individuals’ is ruled and governed by administrative law. This law is understood as the set of norms that are conceived to regulate the organization,

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<sup>69</sup> See H. Rondón de Sanso, Teoría General de la Actividad Administrativa – Organización – Actos Internos (Librería Álvaro y Nora, Caracas-Venezuela 1995), on page 57. See also Merryman, *supra* note 20, on page 248.

<sup>70</sup> It may be of relevance to emphasize that administrative law also governs the other classic powers of the state, i.e., the legislative and judicial powers. In other words, it applies to any power of the state. For example, activities and functions of the legislative branch (i.e., the parliament), are governed to some extent by administrative law; the judicial branch, with regards to its non-jurisdictional functions, is also governed by administrative law. See Goodnow, *supra* note 2, on page 4; and Loughlin, *supra* note 35, on page 26.

Furthermore, this law does not only apply to domestic organizations or public administrations, but also applies to international organizations. In other words, regardless of the fact that the external activities of these international bodies are regulated by international law, their internal functions may be governed by administrative law (this is an example what has become known as global administrative law). In relation to this area, there is a special project called “*Global Administrative Law Project*” which is being conducted by the Institute for International Law and Justice, New York University, Law School. See <<http://www.iilj.org/GAL/>> (Last visit 04/10/2009).

<sup>71</sup> See Neville Brown and Bell, *supra* note 12, on page 129.

<sup>72</sup> In Britain, the executive power passed from the Crown to the Cabinet. See Bradley and Ewing, *supra* note 12, on page 85. See also G. Jordan, The British Administrative System – Principles versus Practice (Routledge, London and New York, 1994).

<sup>73</sup> See Jordan, *supra* note 72.

functions, activity, procedures, duties, rights, liability, and recourses that operate within a state's structure.<sup>74</sup>

One of the most notable aspects of these two administrative legal systems is their activities that are intended to satisfy the concrete public needs in immediate, direct, practical, objective and specific forms.<sup>75</sup>

The administrative activity of the state does have one special characteristic that can be shown which is based on the domestic rules and on the premise of 'the superior relationship that the administration has with individuals' (i.e., on the grounds of the general public interest).<sup>76</sup> Apart from regulating relations between various organs of government and public bodies, the public administration also regulates, based on the aforementioned principle of public administration superiority, the relationships between unequal parties (e.g., an organ of government, on the one hand, and the private individual on the other).<sup>77</sup>

One of the characteristics that differs the most between the French and British administrative legal systems relates to the entity that exercises the regulatory power on behalf of the state. In France, this regulatory power is mainly exercised by ministries while in Britain it is mainly exercised by regulatory agencies. A further difference relates to the jurisdiction that is applied to an administrative dispute.<sup>78</sup> For example, under the French system any dispute related to regulatory power of public

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<sup>74</sup> See Neville Brown and Bell, *supra* note 12, on page 214; Schwartz, *supra* note 23, pages 268-271; and Bradley and Ewing, *supra* note 12, on page 657.

<sup>75</sup> P. Cane, Administrative Tribunals and Adjudication (Hart Publishing, Oxford and Portland, Oregon, 2009). See also Neville Brown and Bell, *supra* note 12; and Rondón de Sanso, *supra* note 69.

<sup>76</sup> This principle is not clearly expressed in the British administrative legal system, but it can be deduced from the functions and goals of the British public administration. E. Lares Martínez, Manual de Derecho Administrativo (XIII Edición, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela 2008), on page 362.

<sup>77</sup> See Neville Brown and Bell, *supra* note 12, on page 176.

<sup>78</sup> See Bradley and Ewing, *supra* note 12, pages 300-322.

administration is addressed by special courts (i.e., the contentious-administrative jurisdiction) whereas under the British system the issue is resolved by the ordinary courts.<sup>79</sup>

Nevertheless, both systems have, amongst other legal aspects, one similarity, which is that they basically provide for legal mechanisms to settle disputes, or they review public administration decisions before turning to the jurisdictional legal remedies. For example, in the French system, a great proportion of the legal mechanisms used to resolve administrative problems have taken the form of a forum to create – in a jurisprudential manner – a set of principles, norms and rules that are compiled with-, in administrative law. These judge-made rules may appear to be similar to the British system due to the fact that one of the main legal sources of the British system is case law.

Furthermore, another similarity is that the functions of public administration are exercised in accordance with the ‘principle of legality’ which produces legal consequences to the conduct of the public administration. Basically, this principle provides legal grounds for acts of the public administration in accordance with ‘the state of law’. In other words, this requirement of legality gives rise to three main consequences: (i) the exercise of the public administration’s activity within the limits and procedures established by the law; (ii) the judicial control over the activities of public administration; and, (iii) the liability attributed to public administration for those damages that its acts may cause to individuals.<sup>80</sup>

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<sup>79</sup> In 2000, a court within the Queen’s Bench Division of the High Court was named the *Administrative Court*. See Bradley and Ewing, *supra* note 12, on page 760.

<sup>80</sup> Vélez García, *supra* note 3, on page 200. For a comparative study on State Responsibility in various countries, see I. Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), pages 382-399.

One principal aspect regarding the state's behaviour is the concern about where to draw the line between public and private law functions with regard to public administration activities, since it is a difficult task for jurists to determine where the dividing line is.<sup>81</sup>

Another important legal aspect regarding the administrative legal system is, as mentioned above, the concept of liability attributed to the public administration. This liability basically tries to counterbalance the privileges that the public administration enjoys at the expense of the protection of individual rights.<sup>82</sup> In this regard, De Laubadère pointed out that 'it cannot be assumed that the autonomy of administrative law is always to the benefit of the administration...' <sup>83</sup>

In addition to this liability, there is the 'attribution of [a] legal or judicial personality' afforded to the public administration which makes it subject to individual responsibilities before various persons (a natural person or a legal person such as corporations or groups).<sup>84</sup> In accordance with administrative law, the public administration is an 'artificial person'.<sup>85</sup>

For this reason, any relationship with the administration represents a declaration of its will to create legal relationships, conclude contracts, increase patrimony, and be liable and justiciable. The personification of the public administration is a primary and *sine qua non* characteristic of administrative law.<sup>86</sup>

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<sup>81</sup> See Neville Brown and Bell, *supra* note 12, on page 126.

<sup>82</sup> See also Marboe, *supra* note 80, on page 389.

<sup>83</sup> De Laubadère; quoted by Neville Brown and Bell, *supra* note 12, on page 23.

<sup>84</sup> See Vélez García, *supra* note 3, on pages 30-31.

<sup>85</sup> Despite the unclear distinction between constitutional law and administrative law in the United Kingdom, an important concern was recognised regarding the personality of the Crown under the British legal system and the safeguarding of individual rights. The personality of the Crown was later abolished by the Crown Proceeding Act of 1947. See Vélez García, *supra* note 3, on pages 74-75. See also Bradley and Ewing, *supra* note 12, on pages 9-10; and Jordan, *supra* note 72.

<sup>86</sup> See Vélez García, *supra* note 3, on page 33.

In any case, it is of utmost importance to highlight that it has been asserted that the state is an abstraction<sup>87</sup> (‘something’)<sup>88</sup> that exercises functions. As a consequence, it creates the need to determine the liability of the state in accordance with the principle of delegated power, which is ultimately based on the principle of the unitary sovereignty of the state.<sup>89</sup>

#### i. Main administrative legal systems and characteristics

For the purpose of this research, the main administrative legal systems are grouped into two regimes: the Continental administrative legal regime, and the Anglo-Saxon administrative legal regime, as they have both influenced legal regimes belonging France and Britain, respectively.<sup>90</sup>

The Continental administrative legal regime is expressed in the legality of the administrative activities and the principle of civil responsibility, attached to public administration, and is derived from the exercise of said activities.<sup>91</sup>

Moreover, it does not only cover the activities of the state with its individuals, but also the presumption of legality of any state conduct. Therefore, it has generally been argued that the state, with regard to its power, is also subjected to the law. The notion of the state being subject to the law also embraces principles of *a special branch of law* known as administrative law.<sup>92</sup>

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<sup>87</sup> A. Jaffe Carbonell, Derecho Internacional Publico (Academia de Ciencias Politicas y Sociales, Serie Estudios 70, Venezuela 2008), on page 239.

<sup>88</sup> See Loughlin, *supra* note 35, on page 58.

<sup>89</sup> See Vélez García, *supra* note 3, on pages 28-29.

<sup>90</sup> See Goodnow, *supra* note 2, pages 234-265 and 266-294.

<sup>91</sup> This doctrine has been developed by various authors, such as Andre de Laubadere and Maurice Hauriou (France); Otto Mayer; W. Jellinek; and E. Kaufmann (Germany); Zanonini (Italy). See Tratado de Derecho Administrativo (8ª Edición, Centro de Estudios Constitucionales, Madrid – Spain 1982), pages 94-117.

<sup>92</sup> See Tratado de Derecho Administrativo, *supra* note 91, on page 101.

This Continental doctrine has been led or promoted by the French administrative legal system and, under this influence, the doctrine has been incorporated into other national administrative legal systems albeit obviously having some typical small differences such as differences which are apparent in the concept of ‘public services’ in France; and in the concepts of ‘public power’ (*öffentliche Gewalt*) and of the ‘general clause’ (*Generalklausel*)<sup>93</sup> in Germany.

The Anglo-Saxon administrative legal system consists of a doctrine whose origins go back to the reforms undertaken by the British Parliament in 1833 through the enactment of various acts such as the Factory Act, Poor Law Act, Corrupt Practices Act, Education Act, and many others.<sup>94</sup>

Throughout this period of reform, other acts were also enacted, such as those giving the government ‘delegated power’. This delegation of legislation conferred some wide-ranging powers upon the British government (ministers) to regulate through statutory rules and orders.

Similarly, other acts confer ‘quasi-judicial’ powers on administrative tribunals that have been created by statute.<sup>95</sup> Under this approach, it needs to be emphasized that another relevant legal aspect related to the British administrative legal system is found in the Crown’s responsibility for the exercise of the administration activities carried by the government on its behalf.<sup>96</sup>

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<sup>93</sup> This refers to the fact that any particular administrative act can be challenged.

<sup>94</sup> This doctrine has been developed by several authors such as Dicey; Carr; Robson; Williams; Port; and Lasky (Britain); Garner; Tunc; and Schwarts (America). See *Tratado de Derecho Administrativo*, supra note 91, pages 94-117; and Bradley and Ewing, supra note 12, on page 301.

<sup>95</sup> For an extended explanation on this point, see H. Rondon de Sanso, *Los Actos Cuasi Jurisdiccionales* (Ediciones Centauro 90, Caracas 1990).

<sup>96</sup> The Crown also has some prerogatives and limitations. See Bradley and Ewing, supra note 12, pages 784-815; and Shalev, supra note 30, on page 457.

Nevertheless, disregarding the increasing tendency to delegate power to the British government, the predominant principle of the 'rule of law' still exists. This establishes the foundation of highly important principles, such as the principle of parliamentary supremacy and of the application of the common law (Dicey's influence) to all individuals (including the civil servants), as well as their obedience to the ordinary law of the state.<sup>97</sup>

Unlike under the French system, regular courts in Britain are in charge of administering justice, therefore these courts are in control with regard to the legality of an administration activity. These court competences are based on the principle that British constitutional law is not the source, but the consequence of an individual right.<sup>98</sup> This doctrine has been influential and has made its way to other legal systems such as those of America, Australia, and New Zealand.

However, the legal systems, which have been influenced by the British system, have some slight differences. For example, in the USA the concept of administrative law is more extensive with regard to public interest services and activities and their subjection to the respective administrative regulation. In fact, in the USA, unlike in Britain, the courts can control the constitutionality of the law.<sup>99</sup>

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<sup>97</sup> See Langrod, *supra* note 30, on page 342.

<sup>98</sup> See Bradley and Ewing, *supra* note 12, on page 725. See also *Tratado de Derecho Administrativo*, *supra* note 91, pages 122-123.

<sup>99</sup> J. C. Adams, *El Derecho Administrativo Norteamericano* (Editorial Universitaria Buenos Aires, Argentina 1964), pages 65-90.

## ii. Concepts of public administration and public authority

The term ‘administration’ comes from the Latin word ‘*ad y administrare*’ which means ‘to serve’.<sup>100</sup> In other words, it involves the function of serving individuals or satisfying the general interest, i.e., it mainly covers the executive function of the state.

The word ‘administration’ has been used in two different ways. The objective meaning refers to ‘the activity, task or functions of the state’. On the other hand, there is the subjective meaning that refers to ‘the body or group of entities or organs in charge of exercising the activity or function of the state’.<sup>101</sup>

In keeping with this line of thinking, J. Rivero defines public administration (referring to the objective meaning) as ‘the activity through which the public authorities seek, depending on the case, if necessary, the prerogatives of the public power, towards the satisfaction of the necessities of public interest.’<sup>102</sup>

Similarly, the Black Law Dictionary defines public authority (subjective meaning) as ‘[The] government at national, regional and other level that performs public administrative functions under national law, including duties, activities or services to safeguard the Public Welfare’.<sup>103</sup>

## iii. Schools of thought on the objective of public administration

The main objective of public administration is the satisfaction of the *general interest* belonging to the state’s people which constitutes its *dominium proprium*.<sup>104</sup> However,

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<sup>100</sup> See Tratado de Derecho Administrativo, supra note 91, on page 27.

<sup>101</sup> See Lares Martínez, supra note 76, on page 23.

<sup>102</sup> J. Rivero, *Derecho Administrativo* (9na Edición, Instituto de Derecho Publico, Universidad Central de Venezuela, Caracas, 1984), on page 14. See also Goodnow, supra note 2, on page 5. Reference translated into English by author.

<sup>103</sup> Definition taken and adapted from Black’s Law Dictionary (Eighth Edition) Thomson West, USA 2004. See Bradley and Ewing, supra note 12, pages 300-322; and Shalev, supra note 30, on page 447.

<sup>104</sup> See Rivero, supra note 102, on page 10; and Bradley and Ewing, supra note 12, on page 657.



within the doctrine there is no clear division between the objectives and functions of public administration.

The main notion comes from the idea of public administration as the state's way of reaching its social objectives in accordance with the law (this line of thought originates from the German school led by Otto Mayer). Further to this, there is also the notion of the public administration as a state activity capable of creating the law (this idea originates from the Austrian School led by Hans Kelsen and Adolf Merkl).

Additionally, there is also a debate between the notion of the public administration as a guarantor and provider of a state's public services (the school of Bordeaux led by Leon Duguit) and the notion of the public administration as the entity that exercises the public power (i.e., public authority) and provides public services (the school of Toulouse led by Maurice Hauriou).

Finally, there is the notion of the public administration as the guarantor of the public interest (the Italian school led by Massimo Severo Giannini) and the notion of the public administration as the entity that creates norms and is the self recipient of it at the same time (this comes from the Spanish School led by Garcia de Enterría y Fernandez).<sup>105</sup>

#### iv. Relationship with the public administration

One of the principal aspects related to the relationship between the public administration and private individuals is the determination of the 'liability of the

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<sup>105</sup> See Lares Martínez, *supra* note 76, pages 19-36.

administration', which requires that the public administration be recognised as an artificial person.<sup>106</sup>

In this regard, liability is determined by the legal performance of the administration's conduct in accordance with the rule of law. This rule provides a basis for judicial control through the 'administrative justice system' (i.e., the effectiveness of the principle of legality).<sup>107</sup>

Regarding the relationship between individuals and the public administration, the relationship can be determined in a simpler way: (i) unilateral (i.e., administrative acts) and (ii) bilateral (i.e., administrative contracts).

It is important to emphasize as a preliminary consideration that, whatever the relationship that exists between the public administration and individuals, the public administration is empowered to create unilateral rights and obligations for individuals, within a determined legal framework. These obligations and rights are binding upon individuals, with or without their consent and this is realised in the form of: decrees, regulations and byelaws. These examples are created within the extensive power of the state and the prerogatives of the Crown.<sup>108</sup>

This considerable power of the state is based on the grounds of the administration's necessity to take 'any measures to preserve public order, even in spite of laws

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<sup>106</sup> In fact, the relationship between the public administration and its liability formally merged under the French system through the Blanco decision in 1873, whereas under the British system the notion of irresponsibility of the government was abolished through the Crown Proceeding Act of 1947. This Act had entitled individuals to sue the administration for damages in tort or contracts. See Neville Brown and Bell, supra note 12, on page 183; and Bradley and Ewing, supra note 12, on page 670.

<sup>107</sup> Bradley and Ewing, supra note 12, on page 670. See also, C. Sarria Olcos, *Justicia Administrativa en Colombia*, Jornadas Colombo-Venezolanas de Derecho Publico, Universidad Externado Colombia (1995), pages 921-974., on page 50.

<sup>108</sup> See Bradley and Ewing, supra note 12, pages 784-815; and Shalev, supra note 30, on page 457.

protecting personal liberty, the right of assembly or the right of freedom of expression'.<sup>109</sup>

In addition, it is also important to highlight that although the public administration is empowered to create unilateral obligations and rights that are binding on individuals, individuals are nevertheless entitled to request that any unlawful or arbitrary decision deriving from the public administration be challenged and adjudicated by the proper public administrative institution (i.e., administrative tribunals) or by judicial power (i.e., courts).

- Parties

The parties to any possible relationship with the public administration are determined by norms that are enacted by law in order to protect the public or private interest. In this respect, these norms establish determined behaviour, and grant powers to individuals in order to exercise or protect their rights.

For example, such parties can be grouped into two categories (i) the administration itself (i.e., the government at the national, regional and other levels that perform public administrative functions under national law<sup>110</sup>), and (ii) individuals with juridical capacity (i.e., national or non-national citizens; corporations or groups that may have an interest with the administration).<sup>111</sup>

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<sup>109</sup> See Neville Brown and Bell, *supra* note 12, on page 221.

<sup>110</sup> See definition of 'Public Authority'.

<sup>111</sup> This is understood as 'the capacity or power of presenting determined enquiries for services [passive subject] or presenting legal remedies [active subject]'. For more about individuals and juridical capacity, see *Tratado de Derecho Administrativo*, *supra* note 91, on page 377.

○ Administrative Acts

Currently, there is a debate concerning the ambiguity and imprecision of the terms ‘legislative’, ‘administrative’ and ‘judicial’ acts. The definition of ‘administrative acts’ can vary from one system to another in terms of its meaning and scope.<sup>112</sup> Furthermore, its definition can also be determined as a consequence of the public administration’s submission to a regime of law (i.e., principle of legality).<sup>113</sup>

Nonetheless, for the purpose and limitation of this research, ‘administrative acts’ can be understood as ‘those acts that emanate from the administration in execution or concretion of the mandate of law’.<sup>114</sup>

Within this context, unlike the French system, under the British system administrative acts are referred to as ‘official acts’, even though the terminology related to each almost has the same meaning.<sup>115</sup>

Similarly, in both legal systems, despite their different origins and terminologies, administrative acts have the same aim: regulating both the public administration’s and the private individual’s behaviour, providing public services and protecting the public interest. This main aim gives grounds to those unilateral acts that are commonly imposed upon the individuals in pursuit of protecting the public interest. That is to say,

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<sup>112</sup> As previously mentioned, one of the main characteristics of administrative law is that it has been developed by case-law; through which the notion of an administrative act has been also shaped. See Cane, *supra* note 75, on page 13.

<sup>113</sup> See *Tratado de Derecho Administrativo*, *supra* note 91, on page 431; and, Bradley and Ewing, *supra* note 12, on page 657.

<sup>114</sup> See *Tratado de Derecho Administrativo*, *supra* note 91, on page 432.

<sup>115</sup> See Bradley and Ewing, *supra* note 12, on page 660; and Neville Brown and Bell, *supra* note 12, on page 157.

this type of action may imply a change in the legal situation of individuals without their consent.<sup>116</sup>

These unilateral acts can be grouped into two major acts: (i) individual acts (requisition, expropriation); and (ii) collective acts (regulatory acts i.e., governmental decrees, ministerial regulations and local byelaws).

On the other hand, the acts of the public administration can also be classified in accordance with number of parties involved, e.g., unilateral acts such as the regulatory acts, and bilateral acts such as state or administrative contracts.

It is important to highlight that one element to be taken into consideration is that the determination of the legal nature of the state or government's acts should be determined through the organ that issues the act (e.g., legislative, judicial or executive powers) and not through the material content of the function that is performed.<sup>117</sup>

Under some administrative legal systems such as the British, French, Venezuelan and American legal systems, administrative acts such as regulatory acts (i.e., as product of delegated legislation) may need to be submitted to a process of consultation with the people.<sup>118</sup>

The main purpose of this consultation process is (i) to avoid any kind of arbitrariness; (ii) to create a balance between the administration's and the nation's interests; (iii) to create an enriching process aimed at improving the administration's efficiency; and (iv)

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<sup>116</sup> See Neville Brown and Bell, *supra* note 12, on page 246; Picker, *supra* note 20, on page 1090; and Cane, *supra* note 75, on page 17.

<sup>117</sup> See *Tratado de Derecho Administrativo*, *supra* note 91, on page 53.

<sup>118</sup> See Bradley and Ewing, *supra* note 12, on page 681.

to take advantages of the input by the people, which may help to improve the administration's own experience.<sup>119</sup>

In addition, it is important to draw attention to the fact that, apart from the normal process of adopting an official act, there is also an exceptional way to adopt an act, which happens as a result of an omission by the administration. This omission is known as silence on the part of the public administration.<sup>120</sup> For example, this administrative silence, under the French administrative legal system, constitutes a rejection of an individual's petition to the administration. This rejection can also, as a consequence, result in an administrative act, and may therefore be justiciable.

Another aspect which should be taken into consideration is the importance of the (formal) form of any justiciable administrative act. Within this context, the (formal) form, apart from procedural rituals that include the validity of the enforceable decision regarding its effects, also constitutes a guarantee to preserve an individual's rights. These forms are considered in accordance with the 'principle of legality'.

There exists a wide range of administrative procedures around the world that have not been put into practice homogenously, even within the legal system of the most developed countries. Consideration must be given to the fact that civil servants may face undefined situations in terms of the scope of the norm to be promulgated.<sup>121</sup> For example, under the American administrative legal system, it has been stated that 'the interpretation of civil servants... constitutes a formed body of experience and judgment to which the courts and litigants must properly go in order to guide them.'<sup>122</sup>

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<sup>119</sup> See Vélez García, *supra* note 3, on page 264.

<sup>120</sup> See Sarria Olcos, *supra* note 107, on page 946.

<sup>121</sup> See Vélez García, *supra* note 3, pages 21 and 257.

<sup>122</sup> Case *Skidmore v. Swift & Co.* (1944), quoted by H. L. A. Hart, *The Concept of Law* (Second Edition Oxford University Press, Great Britain 1994), on page 261.

○ Administrative Contracts

The notion of ‘administrative contracts’<sup>123</sup> also varies from one jurisdiction to another. This notion has been found to be more developed in some jurisdictions than others. For example, the French notion of an administrative contract is far more developed than the notion of a government contract under British law.<sup>124</sup>

Particular examples of this distinction can be found in variations that range from the regulation of complex transactions to aspects related to the public law scope of the contract, such as its subject and finality. Similarly, the variation in notions may also range from the nature of the parties involved (i.e., relationship between public entity/public entity or public entity/private individuals) to the governing law that may apply to the parties and the contract.

The latter aspect may involve elements of private law (i.e., which gives the predominant criteria under the British system, despite the limited prerogative of the Crown on the premise that she cannot hamper her freedom of executive action by contract<sup>125</sup>), or of public law (e.g., which gives the predominant criteria under the French system).<sup>126</sup> Within this context, it is important to clearly distinguish – following the French Doctrine – between pure administrative contracts (e.g., those contracts preponderantly subject to autonomous legal norms such as administrative

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<sup>123</sup> With regard to this particular point, it has been asserted that ‘the distinction between the notion that administrative contracts are subject to public law and the notion that administrative contracts are subject to private law has been based on the debate of French organic criteria and distribution of competences between the administrative jurisdiction and judicial jurisdiction. Furthermore, this distinction has been based on polemic positions between the application of private law and the application of a specialist area of law such as Administrative Law to these kinds of contracts. Nevertheless, the dividing line between these two positions has been difficult to ascertain even nowadays and despite the private law origin of administrative contracts’. E. Garcia de Enterría quoted by A. R. Brewer-Carias, *Contratos Administrativos* (Editorial Jurídica Venezolana, Caracas – Venezuela 1992), on page 41.

<sup>124</sup> ‘The English law on public contracts is far less developed than that in France’. See Neville Brown and Bell, *supra* note 12, on page 212; Mairal, *supra* note 30; and Shalev, *supra* note 30.

<sup>125</sup> See Shalev, *supra* note 30, on page 457; and Langrod, *supra* note 30, on page 332.

<sup>126</sup> See Neville Brown and Bell, *supra* note 12.

law/governmental contracts) and those contracts of a private law nature that relate to the public administration (e.g., those contracts of private law/commercial contracts).<sup>127</sup>

For the purpose of this research, the present study will be limited to the analysis of those pure administrative contracts between the public administration (i.e., the state) and individuals.<sup>128</sup> To this end, administrative contracts can be defined as ‘those contracts that, due to their frequent use for public objectives or for the concrete finality of public service reached, are subjected to a mix private-public law regime, but they are predominantly public law regarding the execution, performance and extinction of contracts’.<sup>129</sup>

With regards to this latter definition, a common aspect of administrative contracts can be identified. This aspect is the one based on the subjection of this type of contract to the legal nature and determination of its own public law object in an agreement which can be patrimonial or non-patrimonial.<sup>130</sup> Additionally, it is appropriate to emphasize that this public law contract-object under negotiation will subsequently subject the legality of the agreement to the application of principles of administrative law. Finally, its validity could be challenged before any administrative or regular court.<sup>131</sup>

Despite the fact that administrative acts and/or contracts (e.g., leasing agreements) have some private law characteristics, it is important to stress that one of the main non-private-law characteristics they have is the incorporation (expressly or tacitly) of considerable powers in favour of the state into the administrative act/contract of the

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<sup>127</sup> For a detailed explanation on the distinction between commercial and governmental contracts, See Brewer-Carias, *supra* note 123, on page 11; Neville Brown and Bell, *supra* note 12, on page 202; and Shalev, *supra* note 30, pages 448-452

<sup>128</sup> See Shalev, *supra* note 30, on page 446.

<sup>129</sup> See Brewer-Carias, *supra* note 123, on page 51; and, Shalev, *supra* note 30, on page 451.

<sup>130</sup> See Brewer-Carias, *supra* note 123, on page 24.

<sup>131</sup> The long-standing discussion regarding the difficulty of drawing the dividing line between those aspects that are governed by private law and those that are governed by public law is still relevant today. See Bradley and Ewing, *supra* note 12, on page 670.



state.<sup>132</sup> These exorbitant powers are understood as those unilateral actions used by the administration to guide, modify, interpret, breach, sanction and/or finish the contractual relationship.<sup>133</sup>

Additionally, these extensive powers are considered to be a part of the public administration's unilateral power that can be exercised on grounds of protecting the public welfare and public interest. Nonetheless, the exercise of these powers has to be carried out by the administration with the due observance of standards of legality. For example, it has been said that such exercise of power may imply that 'decisions are lawful even if no private individuals are affected except as members of the public at large.'<sup>134</sup>

It is also important to point out Mr. G. Vedel's argument which states that 'such exorbitance, in reality does not mean that they can be illicit in private contracts, [this is] unusual and unlikely'.<sup>135</sup>

Nevertheless, it is important to highlight that the impact of these administrative powers on individuals may be to their benefit, but also sometimes they may be to their detriment.<sup>136</sup> For this reason, it is also important to emphasize here that the exorbitant level of power does not have a similar configuration in the context of civil or commercial law, i.e., in private law.<sup>137</sup> For example, under the French system, administrative contracts are referred to as 'essentially an arrangement between unequal parties that makes courts carefully examine [to what extent] an arrangement is a truly

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<sup>132</sup> See Mairal, *supra* note 30, on page 1717; Sarria Olcos, *supra* note 107, pages 921-974; and *Rederiaktiebolaget Amphitrite v The King* [1921] 3 K.B. 500, 503; quoted Shalev, *supra* note 30, on page 447.

<sup>133</sup> E. García de Enterría, and T. R. Fernández, *Curso de Derecho Administrativo I* (Cuarta Edición, Editorial Civitas, S.A., Madrid 1983), on page 635. See also Mairal, *supra* note 30, on page 1720.

<sup>134</sup> See Bradley and Ewing, *supra* note 12, on page 664.

<sup>135</sup> G. Vedel, *Remarques sur la notion de clause exorbitante* cited in *Estudes en l'honneur d' A. Mestre*. Paris 1956, on page 545 and *et. seq.*; quoted by Brewer-Carias, *supra* note 123, on page 47.

<sup>136</sup> See Bradley and Ewing, *supra* note 12, on page 658.

<sup>137</sup> See Neville Brown and Bell, *supra* note 12, on page 142.

bilateral act and therefore a contract, or [to what extent] it is really a unilateral administrative decision to which the other party has merely given his assent'.<sup>138</sup> This compares with the British system, in which the notion of administrative contracts and the administration's regulatory power 'remains unclear'.<sup>139</sup>

Nevertheless, there is a temporary solution for this unclear position under both British and French laws due to the fact there is an increasing tendency to harmonize this subject. For example, under the European Community Directives, parameters have been established in order to outline the conditions that are necessary to arrange public contracts in areas such as works, procurement and service.<sup>140</sup>

In relation to the applicable legal regime enabling the administration to conclude public-law contracts, it is of importance to stress that administrative contracts are (in one way or another) subject to a common and uniform regime of public law and therefore to legal processes that are perceived to materialize the administration's will (i.e., pre- and post- formalities that vary from one jurisdiction to another). However, it is an accomplished fact that the public administration, as a party to a contract, needs to give its express and indubitable consent to conclude a given administrative contract.<sup>141</sup>

Furthermore, it is up to the administration to decide on whether to conclude contracts that are predominantly governed either by private law or by public law and whether these contracts need to fulfil certain determined formalities.<sup>142</sup> Firstly, there is a subjective element related to the participation of any state's entities in a given juridical

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<sup>138</sup> Ibid., on page 202.

<sup>139</sup> 'Until the Local Government Act 1988, English Law did not have much in the way of formal national legislation or case-law on the awarding of government contracts. Government practice, reinforced by audit, regulated this field, though discretion in the awarding of contracts was not unlimited in law.' See Neville Brown and Bell, *supra* note 12, on page 205.

<sup>140</sup> Ibid., on page 205.

<sup>141</sup> See Brewer-Carias, *supra* note 123, pages 75-97; and Langrod, *supra* note 30, on page 327.

<sup>142</sup> These characteristics have been taken and summarised from Brewer-Carias, *supra* note 123, pages 61-72.

relationship. Secondly, there is the condition of validity of the contract which mainly refers to questions relating to the capacity and competence of the parties,<sup>143</sup> the consent,<sup>144</sup> the object,<sup>145</sup> and the cause<sup>146</sup> of the contract (i.e., implying the restriction of the contractual principle of freedom of contract).<sup>147</sup> Thirdly, administrative contracts include a subordination element in terms of *the superior relationship that the Administration has with individuals*<sup>148</sup> which is based on the administration's duty to protect the public interest. Fourthly, there is also a mix of the private-public law regime that may be applicable to administrative contracts and which subsequently largely depends on the appropriate law (i.e., private or public law).<sup>149</sup>

The due observance of these formalities in order to materialize the administration's will (i.e., rules regarding competence, administrative proceedings, budget estimations and public tenders)<sup>150</sup> will also depend on the legal principles applied in a certain jurisdiction. Ultimately, under whatever circumstances an administrative contract needs to be concluded, its formalities must comply with the principle of legality.

The consideration of administrative contracts as an arrangement essentially between unequal parties (French doctrine), gives rise to the question of why the public

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<sup>143</sup> It is important to point out that there the principles of administrative law (public law) known as *Principles of Legality* and of *Unauthorised Delegation* which provide that a public authority is allowed to do what is expressly established by law (i.e., principle of competence). This compares to the principle of private law known as the *Principle of Party Autonomy* which provides that an individual person is allowed to do what is not expressly forbidden by law (i.e., principle of capacity).

<sup>144</sup> The consent of the administration has to be given in accordance with domestic law and proceedings, i.e., with due observance of the law. Otherwise, the administration's consent can be biased. In this regard, the general principles of law (i.e., misrepresentation; wrong; undue influence; and duress) elaborated by the civil law doctrine can still be applicable to administrative contracts. Brewer-Carias, supra note 123, on page 65.

<sup>145</sup> In addition to other typical contracts' obligations to give, to do or refrain from doing, the object of the administrative contract also needs to be possible; licit; determined; or determinable, with the particular feature of complying and providing services of public utility or of general interest. Brewer-Carias, supra note 123, on page 68.

<sup>146</sup> The cause of the contract needs to be licit; in accordance with the law, morality, and public order. Brewer-Carias, supra note 123, on page 69.

<sup>147</sup> See Shalev, supra note 30, on page 446.

<sup>148</sup> See Lares Martínez, supra note 76, on page 362.

<sup>149</sup> For a detailed explanation of the private-public nature of the administrative contracts, see Shalev, supra note 30.

<sup>150</sup> See Brewer-Carias, supra note 123, pages 44-45

administration has such a higher and unassailable position before private individuals (Dicey's doctrine).

The main answer to this concern is founded upon one of the most important objectives of the state, i.e., the idea of protecting the public interest and promoting national welfare. As mentioned above, this idea gives rise to excessive powers (i.e., unilateral actions) in favour of the administration to guarantee its aims and objectives.<sup>151</sup> Their application even goes beyond those contractual relationships that are predominantly dominated by private law (e.g., in the case of expropriation).<sup>152</sup>

Within this context, several doctrines or theories have emerged relating to the performance of the public administration's unilateral power, which should be exercised in favour of the public interest, which must prevail over the interest of particular individuals and even over the principle of *pacta sunt servanda* (agreements must be kept).<sup>153</sup> Nonetheless, these doctrines or theories have been viewed with a certain distrust when they are embodied within civil law contractual agreements, since they infer a tendency to abuse the position of dominance by one of the parties.<sup>154</sup>

Such doctrines or theories are as follows: (i) doctrine of the contractual equilibrium and modification (i.e., the power of the public administration to redefine the character of a service provided, which needs to be done in accordance with the necessity of meeting the changing needs of the public interest and subsequently, the consideration of the

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<sup>151</sup> See Sarria Olcos, *supra* note 107, pages 921-974.

<sup>152</sup> See Brewer-Carias, *supra* note 123, on page 47; and B. Kingsbury, and S. W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 91.

<sup>153</sup> See Mairal, *supra* note 30, pages 1738-1739; and Shalev, *supra* note 30, pages 446 and 457.

<sup>154</sup> See García de Enterria and Fernández, *supra* note 133, on page 635.

contract's equilibrium);<sup>155</sup> (ii) the doctrine of *Fait du prince*<sup>156</sup> or *factum principis* (i.e., it is the exorbitant power *par excellence* which expresses the famous *ius variandi* and it is known as the act of state);<sup>157</sup> (iii) the theory of risk or liability without fault (i.e., the 'principle of the equality of all citizens in bearing public burdens');<sup>158</sup> and, (iv) the theory of *Imprévision*<sup>159</sup> (i.e., the supervening circumstances that may arise after the formation of the contract and that go beyond the parties' control, such as matters of inflation or monetary depreciation).

However, despite the application of these doctrines, the aggrieved individual is entitled to damages and compensation for the actions taken by the administration, especially those that may affect the equilibrium of the contracts. Nonetheless, an individual cannot allege wrongfulness or question the legality of the administration's unilateral action to modify the contract,<sup>160</sup> except if it was done without due observance of the law.

In summary, as L. Neville Brown stated, 'the mere fact that the administration is a party to a contract does not make it necessarily a pure administrative contract'. It will depend on the particular characteristics of each individual contract, based on the mix of the private-public law regime applicable to it, in order to determine whether it

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<sup>155</sup> See Brewer-Carias, *supra* note 123, on page 202; Bradley and Ewing, *supra* note 12, on page 676; and Neville Brown and Bell, *supra* note 12, on page 206.

<sup>156</sup> This is the doctrine of act of state in English tort law. See Neville Brown and Bell, *supra* note 12, on page 207; and Mairal, *supra* note 30, on page 1738.

<sup>157</sup> According to Prof. E. C. S. Wade, an act of state is 'an act of the executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown'. Quoted by B. Thompson, *Constitutional & Administrative Law* (Second Edition, Blackstone Press Limited, UK 1995), on page 98. See also Bradley and Ewing, *supra* note 12, on page 259; Neville Brown and Bell, *supra* note 12, pages 135-136; and García de Enterría and Fernández, *supra* note 133, on page 637.

<sup>158</sup> See Neville Brown and Bell, *supra* note 12, on page 193.

<sup>159</sup> This is based on the decision of the French Council of State (1916) on the contract of gas supply for the lighting of the streets in Bordeaux, known as COMPAGNIE GENERALE D'ECLAIRAGE DE BORDEAUX (30 March 1916). Quoted by Brewer-Carias, *supra* note 123, on page 229. This doctrine has some similarities to the doctrine of frustration in English Law, see Neville Brown and Bell, *supra* note 12, on page 209.

<sup>160</sup> See Brewer-Carias, *supra* note 123, on page 48.

constitutes a pure administrative contract, or a private contract. This distinction will also determine the justiciable nature of such contracts and therefore the competent jurisdiction and court.<sup>161</sup>

v. Public administration and economic issues of public interest

The ideas put forward in the previous sub-section also apply to one of the most important facets of the public administration. This facet is related to the dual role of the state within its national socio-economic aspects: that is to say, the state's role as a *regulatory entity* (i.e., as a rule-making authority/state-regulator) and its legal prerogatives, on one side, and, the state's role as an *entrepreneur* (i.e., as a contracting party or as a partner of individuals/state-contractor), on the other.<sup>162</sup>

It is here that the question about the coexistence between the various natures of administrative activities and the limitation of economic freedom arises.<sup>163</sup> This is especially so when the exercise of the said economic freedom is limited by the state.<sup>164</sup> This limitation requires the administration to take into consideration those limitations proposed by the state, through administrative (sub-legal)<sup>165</sup> or legislative (legal) acts on grounds of public interest and in accordance with the law.<sup>166</sup>

<sup>161</sup> See Neville Brown and Bell, *supra* note 12, on page 141.

<sup>162</sup> See García de Enterría y Fernández, *supra* note 133, on page 638; and Shalev, *supra* note 30, on page 445.

<sup>163</sup> This notion was developed by the Décret d'Allarde (March 1791) and Loi Le Chapelier (June 1791); quoted by J. I. Hernández González, *Derecho Administrativo y Regulación Económica* (Colección Estudios No. 83, Editorial Jurídica Venezolana, Caracas 2006), on page 114.

<sup>164</sup> The limitation of the economic freedom is based on the intervening power of the administration which is primarily granted through legislative acts. See Bradley and Ewing, *supra* note 12, on page 784; and M. Sornarajah, *The International Law of Foreign Investment* (Second Edition, Cambridge University Press, UK 2004), pages 85-86.

<sup>165</sup> With the exception of the Decree-Laws that are promulgated in accordance with an Enabling Law.

<sup>166</sup> See Hernández González, *supra* note 163, on page 111.

The nature of this ‘limited right’ concerning economic freedom and the rule of law deserves special reflection since the state’s main goal is to primarily guarantee the continuity of its public services and to maintain a good level of social welfare.<sup>167</sup>

Consequently, the public administration has to ensure, as mentioned above, the satisfaction of the people’s needs. This assurance also involves safeguarding the exercise of economic regulation or deregulation of the administration. This exercise subsequently makes individuals come in to contact *ab initio* with civil servants rather than with judges.<sup>168</sup>

Within this context, such a guarantee or satisfaction of people’s needs is accompanied in terms of the public administration activities with all those prerogatives established expressly by law.<sup>169</sup>

A remarkable example of the state’s regulation (either considered as legislative or administrative interventionism)<sup>170</sup> regarding economic issues on grounds of public interest is found during the financial crisis of 2008, when it was argued that ‘[the] government creates markets, and markets can exist only with regulation’.<sup>171</sup>

Nevertheless, it can be argued that the legislator could decide by statute to exclude all or some aspects of certain public services and therefore grant these services to private

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<sup>167</sup> Case *G.A.N.B, Inspectores de Riesgos Asociados, S.A.*, Constitutional Chamber of the Venezuelan Supreme Court of Justice, dated 15 December 2005; quoted by Hernández González, *supra* note 163, on page 111. See also Bradley and Ewing, *supra* note 12, pages 104-105.

<sup>168</sup> See Neville Brown and Bell, *supra* note 12, on page 130; and F. Zakaria, *Big Government to the Rescue*, Newsweek Magazine, pages 24-25 (September 2008), on page 24. See also J. Donn, H. J. Hebert, and M. Weiss, *Emerging oil rig evidence shows lack of regulation* <[http://news.yahoo.com/s/ap/20100513/ap\\_on\\_bi\\_ge/us\\_gulf\\_oil\\_spill](http://news.yahoo.com/s/ap/20100513/ap_on_bi_ge/us_gulf_oil_spill)> (Last visit 13/05/2010); and, Bradley and Ewing, *supra* note 12, on page 9.

<sup>169</sup> See Bradley and Ewing, *supra* note 12, on page 105.

<sup>170</sup> See Hernández González, *supra* note 163, on pages 120 and 121.

<sup>171</sup> See Zakaria, *supra* note 168, on page 3. See also R. Cole, *The Unwritten Laws of Finance & Investment* (Profile Books, London, 2011), on page ii.

operators (e.g., services of gas, water, electricity). This exercise is known as the privatization of the state's activity.

Notwithstanding, it is important to highlight here, despite the existence of the principles of *mutuus consensus* (mutual consensus) and *mutues disensus* (mutual dissention), the prerogatives of the administration are not all excluded from the privatized activities.<sup>172</sup> On the contrary, it is sufficient for the public administration that the public interest is involved in this privatized activity in order for it to exercise its legal prerogatives. This exercise can be carried out by the administration even within the inter-party contract as can happen in the cases of expropriation and of fiscal measures.<sup>173</sup>

Thus, international investment law litigants may express their concern about the legal protection of an individual's economic-rights in the event of economic regulation or deregulation.<sup>174</sup> However, the response to this concern is found in the international legal premise, which guarantees that any potential controversy shall be decided mainly, by ordinary courts or administrative courts, in accordance with the principles that are applicable to determined contractual or administrative agreements. This guarantee will also be carried out by domestic tribunals, except if otherwise agreed, in accordance with the legal framework of their jurisdictions (e.g., under ordinary jurisdiction in the British system or the contentious-administrative jurisdiction in the French system).

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<sup>172</sup> See Brewer-Carias, *supra* note 123, on page 169; and Shalev, *supra* note 30, on page 457.

<sup>173</sup> See García de Enterría y Fernández, *supra* note 133, on page 637.

<sup>174</sup> See Hernández González, *supra* note 163, on pages 112 and 113.



vi. Public administration and management and control of natural resources.

In many countries, natural resources imply notions of sovereignty,<sup>175</sup> property and ownership;<sup>176</sup> and to some extent the notion of *Jus Cogens*.<sup>177</sup> The ownership of natural resources and activities relating to them have been legally ‘reserved’ to the state as state-owner in the majority of the producing countries’ legal systems for reasons of national expediency.<sup>178</sup> This legal reserve has been performed by states either through an express provision in the constitution or through enacted statutes. This reserve embraces essential elements of a law of *ordre public* (public policy).

‘Reserve’, or ‘*publicatio*’<sup>179</sup> in Spanish, is the denomination that is given to specific goods and/or activities which cannot be freely used or exercised by individuals (i.e., it excludes or limits the principle of economic freedom).<sup>180</sup> In other words, these goods and/or activities are reserved for the exclusive use or exercise by the state.

However, despite this, it is noteworthy to mention here that a legal reserve can either be absolute or relative. Activities relating to natural resources may represent a ‘relative reserve’ in some countries such as Venezuela since they may allow, to some extent, for

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<sup>175</sup> For a detailed study on permanent sovereignty over natural resources, see N. Schrijver, *Sovereignty over Natural Resources – Balancing Rights and Duties* (Cambridge Studies in International and Comparative Law, Cambridge University Press, UK 2008), pages 33-170; P. D. Cameron, *Property Rights and Sovereign Rights: The Case of North Sea Oil* (Academia Press INC, London 1983); and K. Hossain, and S. R. Chowdhury, *Permanent Sovereignty Over Natural Resources in International Law – Principle and Practice* (Frances Pinter Publishers, London 1984). See also Brownlie, *supra* note 22, on pages 539-541

<sup>176</sup> See, e.g., the legal classification of the petroleum reservoir in H. Rondón de Sanso, *El Régimen Jurídico de los Hidrocarburos – El Impacto del Petróleo en Venezuela* (First Edition, Epsilon Libros, Venezuela 2008), on page 72.

<sup>177</sup> See, e.g., J. Ollarves Irazabal, *Ius Cogens en el Derecho Internacional Contemporáneo* (1ª Edición, Instituto de Derecho Público, Universidad Central de Venezuela, Caracas 2005). See also Schrijver, *supra* note 175, pages 221-222 and 374-377; and Brownlie, *supra* note 22, pages 510-512.

<sup>178</sup> For example the nationalization or reservation of petroleum activities to the State as done in Venezuela; Iran; Mexico; Bolivia; Iraq; Libya; etc. See Schrijver, *supra* note 175, pages 289-292 and 344-346.

<sup>179</sup> This is the fundamental element of nationalization. As the French Constitutional Council stated in 19 January 1984, ‘nationalization “implies the transfer of a company’s property as a consequence of a decision taken by the Public Authority which individuals must obey ”.’ Quoted by Hernández González, *supra* note 163, on page 482.

<sup>180</sup> See Rondón de Sanso, *supra* note 176, pages 66-68; and Hernández González, *supra* note 163, on page 157.

the participation of private individuals within the monopolistic market through different legal schemes.<sup>181</sup>

In this regard, it is important to emphasize that the fact that a private individual is granted a given concession or similar instrument does not necessarily mean that he/she is entitled to freely exercise his/her rights, but that he/she can do so only in accordance with those boundaries established by the law and the respective contract.

In fact, it has been said, that under this ‘legal reserve’, sovereignty, as well as ownership, allow the state-owner to exercise its rights without compromising their entitlements. For example, if a state-owner decides to conclude a contract with a private investor to exploit its land, it does not mean that the state loses the ownership of the land. On the contrary, it has been argued that the state-owner only yields the use of land temporarily.<sup>182</sup>

Additionally, it has also been said that if this premise were applied to subjective rights, the applicable regime would be even more severe in terms of public powers (i.e., including the public administration’s prerogatives),<sup>183</sup> which are – at the same time– integrated parts within the concept of sovereignty of the state.<sup>184</sup> For example, when a state-owner makes an agreement with private individuals, through any entity of its public administration as state-contractor, either of a public law or private law nature, to use its goods and resources, it can only act if the law has empowered the official to do so. Therefore, the exercise of these rights does not mean that the sovereignty of the state is being compromised.

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<sup>181</sup> Mainly through petroleum licences; production sharing agreements; joint ventures; and, operating services contracts. See Cameron, *supra* note 175, pages 10-20; and Sornarajah, *supra* note 164, pages 69-71.

<sup>182</sup> See Rondón de Sanso, *supra* note 176, on page 411.

<sup>183</sup> See Pérez Luno, *supra* note 29, on page 26.

<sup>184</sup> See Rondón de Sanso, *supra* note 176, pages 411-416.

Conversely, if the state-owner acted through its public administration, without the express delegation of the law, the act would be vitiated and its declaration of will would not produce any effect.

Natural resource exploitation agreements commonly have a singular characteristic, which is that when a private individual is contracting with a sovereign state, the said private individual must be aware that his/her co-contracting party (i.e., the sovereign state) is a public entity vested with public powers. Therefore, the state-owner possesses discretionary or exorbitant powers.<sup>185</sup>

As mentioned before, these faculties are part of the sovereign power of the state because they are derived from the necessity to satisfy the superior interest of the state which is under the protection of the state.<sup>186</sup>

#### **e. Public administration, settlement of disputes and administrative justice**

The materialization of the legal relationship between the public administration and individuals is manifested through the existence of *a formal administrative act* (including administrative contracts) which is issued by an entity belonging to the public administration. This relationship also creates legal expectations for each party in terms of balancing the social objectives of the state with the private interests of individuals.<sup>187</sup>

These administrative acts and contracts, according to the respective law, need to follow some essential legal formalities known as *administrative procedures*.<sup>188</sup> In the case that such acts or contracts do not follow these procedures, they run the risk of being

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<sup>185</sup> See Schrijver, *supra* note 175, on page 292.

<sup>186</sup> See, e.g., the legal classification of the petroleum reservoir in Rondón de Sanso, *supra* note 176, on page 72.

<sup>187</sup> *Ibid.*, on pages 411-426.

<sup>188</sup> See, e.g., American Proceeding Act.

quashed by a court.<sup>189</sup> The function of the system of administration of justice requires the existence of this *sine qua non* legal requisite (i.e., the voidable administrative act as a consequence of *Acta Jure Imperii* of the state) to activate the ‘administrative justice system’.<sup>190</sup>

Under both administrative legal systems, the ‘administrative justice system’ represents a mechanism to control and review public decisions (i.e., those acts of *Jure Imperii*<sup>191</sup>) related to protecting the interests of both state and individuals. The tension between the states interest and the individuals’ interests requires a certain discretionary power from decision-makers at the moment of balancing these two positions.<sup>192</sup> This kind of disagreement is known as a ‘regulatory dispute’.

Both legal systems have the same major problems, i.e., regulatory disputes as a consequence of the justiciable aspect of those acts emanating from public authorities and their effects on individuals.

The justiciable nature of these acts has additionally created an extended forum to adjudicate administrative matters; this is a mechanism that is used to control the administration’s actions.<sup>193</sup> This mechanism of control can be carried by a public law adjudicator; either through an administrative review where the proper administration resolves the dispute (i.e., an internal/internal review e.g., public enquiries or an internal

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<sup>189</sup> See Bradley and Ewing, *supra* note 12, on page 9.

<sup>190</sup> See Cane, *supra* note 75, on page 18.

<sup>191</sup> Some *Acts of Jure Imperii* require other legal mechanisms to be reviewed i.e., those acts that are intimately related to the notion of sovereignty. For example, in the UK, acts of parliament cannot be reviewed by courts whereas in France, these acts can be reviewed, but only by the Constitutional Council.

<sup>192</sup> See Cane, *supra* note 75, on page 12.

<sup>193</sup> For a detailed explanation of the differences between the nature of a tribunal and court; See Cane, *supra* note 75, pages 2-5; and Bradley and Ewing, *supra* note 12, on page 9.

review e.g., administrative tribunals) or, through judicial mechanisms, where these administrative matters are reviewed by courts (i.e., an external review).<sup>194</sup>

The legal structures of the French and British judicial systems have substantial similarities with regards to civil and criminal jurisdictions, but less in terms of administrative jurisdictions. For example, in France, the contentious administrative function is exercised by the Executive through the Council of State, whereas in Britain, the Executive does attend some administrative disputes, but only those non-contentious ones which are not ‘ripe’<sup>195</sup> enough to be submitted to the courts.<sup>196</sup>

Moreover, the common aim of these two administrative legal systems is based on the need to exercise judicial protection of individuals. This judicial protection implies that administrative actions that have emanated from the administration by the exercise of its powers have put the rights of individuals at risk. Such powers of the administration are derived from enacted delegations (i.e., delegated power).

For this reason, it is said that these acts are subject to judicial control: hence the main idea is to guarantee that the acts in question do not trespass into the domain left to parliament, or constitutional principles or general principles of law.<sup>197</sup>

It is the responsibility of the judges to distinguish between and define matters of public law and matters of private law in order to determine their competence over the legal issues in dispute. For example, this task is entrusted to the tribunal of conflict in

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<sup>194</sup> This is understood as the action of reviewing the administrative acts which have emanated from a particular entity belonging to the administration. This compares with the action by the original decision-making entity to internally review those acts which have emanated from it. For more about the differences between internal review and external review; See Cane, *supra* note 75, on page 7.

<sup>195</sup> Ripeness refers to whether all the preliminary stages of review have been exhausted.

<sup>196</sup> See Cane, *supra* note 75, on page 89; and Bradley and Ewing, *supra* note 12, on page 89.

<sup>197</sup> It may now be appreciated that the English distinction between legislation (i.e., Acts of Parliament) and subordinate or delegated legislation cannot be rigidly applied in France. See Neville Brown and Bell, *supra* note 12, on page 14.

France. To this end, it may be said that the administration of justice is, in terms of public law, a sensitive task for judges because they need to find the right equilibrium between the interests of the state and those of individuals.

In summary, it is important to point out that, within the relevant scholarly literature of administrative law, two major legal principles can be found which apply to the administration's activities or decisions: i) the principle of legality which obliges the administration to act in accordance with the law; and ii) the principle of liability which establishes the administration's responsibility for any damages caused to an individual, and therefore establishes the need to compensate the aggrieved individual.<sup>198</sup>

#### i. Administrative review (internal revision)

As a preliminary comment, it is important to accentuate that administrative review refers to those legal mechanisms that are provided by the legislator to challenge those acts deriving from the administration which may have aggrieved individuals (i.e., internal revision) before the same executive power.<sup>199</sup> In contrast, as will be seen later, there are legal mechanisms that are designed by the legislator to challenge such acts but they may be challenged before a different state power, such as the judicial branch (i.e., external revision).<sup>200</sup>

Here it is also important to clarify that despite the fact that the Council of State in France is part of the executive power, its judicial functions in terms of administrative adjudication (external review) can be compared to the judicial control exercised in the British system. For this reason, the juridical functions of the Council of State will be addressed in the next sub-section.

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<sup>198</sup> Ibid., pages 175-261.

<sup>199</sup> See Cane, *supra* note 75, on page 7.

<sup>200</sup> For more details about internal and external reviews, see Cane, *supra* note 75, pages 6-16.

Additionally, it is also important to point out that within the administrative review mechanisms; there is also the doctrine of minister judge (i.e., a kind of internal-internal review).<sup>201</sup> This particular administrative mechanism basically gives individuals the chance of inquiring/complaining before the competent minister, as the original decision-maker, about certain decisions that were originally taken by him.<sup>202</sup> For example, in the French system, it is carried out by legal remedies such as administrative recourses of reconsideration or revision and in the British system it is carried out by public inquiries. In some legal systems, these proceedings need to be exhausted before resorting to courts to resolve a legal matter<sup>203</sup> (see e.g., the American theory of ‘ripeness’).<sup>204</sup>

On the other hand, despite the debate between the Montesquieu doctrine on the division of powers and the constant shifting between the powers,<sup>205</sup> there are ‘quasi-judicial’<sup>206</sup> mechanisms available to resolve regulatory disputes between the state and individuals. These special mechanisms are located within the proper bureaucratic structure of the executive power such as the administrative tribunals in the British system.<sup>207</sup> It has been argued that these administrative tribunals have independence in terms of judicial jurisdiction.<sup>208</sup>

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<sup>201</sup> See Neville Brown and Bell, *supra* note 12, on page 47; Cane, *supra* note 75, on page 7; and Goodnow, *supra* note 2, pages 73-74.

<sup>202</sup> ‘Many matters are entrusted not to tribunals but to government departments and ministers for decision’. See Bradley and Ewing, *supra* note 12, on page 89; and Cane, *supra* note 17, pages 175-184.

<sup>203</sup> See Cane, *supra* note 75, on page 8.

<sup>204</sup> ‘Ripeness’ indicates that the claim is ready to be reviewed by a court. In other words, it refers to a case that has a real, actual and concrete jurisdictional problem, and not a hypothetical, abstract and remote problem, since the judicial organs have been conceived to settle disputes of legal relevance. See case *Abbot Laboratories Inc. v Gardiner* (1967); quoted by Vélez García, *supra* note 3, on page 315. See also Fox, *supra* note 56, on page 272.

<sup>205</sup> See Cane, *supra* note 75, on page 87.

<sup>206</sup> See Bradley and Ewing, *supra* note 12, on page 668.

<sup>207</sup> Normally, they are confirmed by one or three specialized adjudicators. K. Eddey, *The English Legal System* (Third Edition, Sweet & Maxwell, London 1982), pages 93-94.

<sup>208</sup> See Cane, *supra* note 75, on page 70.

Within this context, judicial independence refers to the separation of the judicial review from the public entity whose decisions they are entrusted to review. Despite this, the review is still being taken by the same branch of power (e.g., the executive branch), instead of being reviewed by another branch of power, such as the judicial branch.<sup>209</sup>

This legal mechanism of administrative review, i.e., by administrative tribunals is more of a British legal phenomenon than a French one.<sup>210</sup> Under the French system, the mechanism of administrative arbitration provided by law as a non-judisdictional mechanism to resolve controversies between the public administration and individuals is a similar mechanism to British administrative tribunals.<sup>211</sup> Here, it is important to point out that these legal mechanisms are not used as often as the administrative tribunals in the United Kingdom (UK).

The existence of these administrative tribunals depends upon the promulgation of given acts of parliament.<sup>212</sup> Their main aim is to ‘hear and decide [regulatory] disputes on a court-like basis’.<sup>213</sup> Therefore, on account of this, their decisions are considered as ‘quasi-judicial’ acts, because these tribunals act as a non-judicial entity, (i.e., ‘a species of court’<sup>214</sup>), despite the fact that they are recognised as part of ‘the machinery of justice’.

It has been argued that the functions of such tribunals are viewed as a kind of penetration of the jurisdictional function belonging to the judicial branch into public

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<sup>209</sup> Ibid., on page 70.

<sup>210</sup> For an extensive and detailed list of administrative tribunals within the United Kingdom, See <<http://www.ajtc.gov.uk/stats/index.htm>> (Last visit 05/05/2010). See also Bradley and Ewing, *supra* note 12, on page 83.

<sup>211</sup> For a detailed explanation of administrative arbitration, see L. Fraga Pittaluga, *El Arbitraje en el Derecho Administrativo* (Universidad Católica del Táchira, Caracas – Venezuela 2000). See also A. Patrikios, ‘*L’Arbitrage en matière administratif*’, Librairie Generale de Droit et de Jurisprudence, E.J.A., Paris, 1997, pages 2-3; quoted by L. Fraga Pittaluga, *El Arbitraje en el Derecho Administrativo* (Universidad Católica del Táchira, Caracas – Venezuela 2000), on page 47.

<sup>212</sup> See Eddey, *supra* note 207, on page 91.

<sup>213</sup> Ibid., on page 91.

<sup>214</sup> See Cane, *supra* note 75, on page 72.



administration and as a complementary mechanism to administer justice, even following the proper rituals of common justice.<sup>215</sup> In fact, it has also been argued that they operate with the supervision of the superior civil courts.<sup>216</sup>

In this regard, due to the fact that these administrative tribunals form a part of the executive power and despite their alleged judicial independence, they need to apply, to some extent, questions of administrative policy (i.e., those points that contravene the public interest and public welfare) to the solution.<sup>217</sup> Therefore, they allow the administrative judges to apply a wide range of aspects related to the public interests.<sup>218</sup> Obviously, with regard to this, one may be concerned with the idea of combining ‘in one and the same body the two functions of implementing rules and adjudicating disputes about their implementation’.<sup>219,220</sup>

Nonetheless, it is important to note that British administrative tribunals are completely different, in terms of their nature and functions,<sup>221</sup> to their French counterpart, *tribunaux administratifs*.<sup>222</sup> Firstly, ‘the French system is founded on the use of separate administrative courts whereas the British system relies heavily on the superior civil courts’.<sup>223</sup> Secondly, within the previous argument, it has been stated that while the British system is conceived to be ‘an adjudicating agency outside the ordinary courts and having *a jurisdiction limited* to some specific sphere of administrative activity’<sup>224</sup> (emphasis added); the French system has a ‘*general judicial control* over administrative

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<sup>215</sup> See Vélez García, supra note 3, on page 143.

<sup>216</sup> See Bradley and Ewing, supra note 12, on page 83.

<sup>217</sup> See Cane, supra note 75, on page 12.

<sup>218</sup> See Vélez García, supra note 3, page 152.

<sup>219</sup> See Cane, supra note 75, on page 15.

<sup>220</sup> The creation of these tribunals may conform to the idea of creating speedier and cheaper mechanisms as well as to be able to rely on knowledgeable and experienced people. See Cane, supra note 75, pages 69-72.

<sup>221</sup> See Elliott, Jeanpierre and Vernon, supra note 19, pages 115-126.

<sup>222</sup> See Vélez García, supra note 3, on page 169. See also Schwartz, supra note 23, pages 59-62.

<sup>223</sup> See Bradley and Ewing, supra note 12, on page 660.

<sup>224</sup> See Neville Brown and Bell, supra note 12, on page 58.

action' (emphasis added), which represents a special jurisdiction under the control of the Council of State.<sup>225</sup>

It is of importance to highlight here that, in most of the countries which are influenced by the French administrative legal system, the contentious-administrative jurisdiction is paradoxically part of the judicial power.

In conclusion, decisions taken by these administrative tribunals are subject to judicial review in the respective jurisdictions. Within this context, some scholars have classified these decisions as decisions of primary jurisdiction,<sup>226</sup> being those decisions which emerge from the administration itself. This is in contrast to the secondary jurisdiction or *De Novo Review*<sup>227</sup> which refers to those controversies that are resolved by courts as a consequence of reviewing cases decided by the primary jurisdiction.<sup>228</sup>

One final key legal point is related to the non self-enforcing nature of primary jurisdiction decisions which mostly need to be resolved before a judge in order to become enforceable, unless the affected party decides to comply with it voluntarily.<sup>229</sup>

## ii. Judicial review (external revision)

In juxtaposition to the administrative review process is the judicial review process. Judicial review refers to those legal mechanisms that are provided by the legislator to

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<sup>225</sup> The appearance of this special jurisdiction is mainly based on the famous French Law 16-24 August 1970, which states in article 13: 'Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.' Quoted by Neville Brown and Bell, *supra* note 12, on page 46.

<sup>226</sup> See Fox, *supra* note 56, on page 272.

<sup>227</sup> *Ibid.*, on page 291.

<sup>228</sup> See Vélez García, *supra* note 3, on page 310.

<sup>229</sup> *Ibid.*, on page 321

challenge public administration decisions, but before a different state power such as the judicial power (external review).

In order to activate judicial control as part of the ‘administrative justice system’ of the state, the existence of a determined voidable administrative act or executive decision emanating from a given governmental body, including administrative tribunals, is necessary.<sup>230</sup>

In this regard, there are public law remedies such as judicial review, right to appeal, ombudsmen, etc., that work as a mechanisms to guarantee individual rights. One example of these public law remedies is the British idea of judicial review, which basically refers to ‘judicial control of public-decision making in accordance with rules and principles of administrative law’.<sup>231</sup>

The result of this legal remedy is based, unless there is no suitable alternative remedy (e.g., the right to appeal) which can resolve the problem, on the grounds of illegality, irrationality, or unfairness.<sup>232</sup>

Additionally, the result is finally, but not always, materialized through public or private law orders (i.e., forms of relief<sup>233</sup>) such as: quashing orders,<sup>234</sup> prohibiting orders,<sup>235</sup> mandatory orders,<sup>236</sup> declarations,<sup>237</sup> injunctions,<sup>238</sup> and damages.<sup>239</sup> The same functions and results of reviewing the administration’s decisions are pursued under the

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<sup>230</sup> See Bradley and Ewing, *supra* note 12, on page 725; and Schwartz, *supra* note 23, pages 113-120.

<sup>231</sup> See Cane, *supra* note 17, on page 29.

<sup>232</sup> J. Jowell, and A. Lester, *Beyond Wednesbury: Substantive Principles of Administrative Law* (1987) Public Law 368, on page 369.

<sup>233</sup> Supreme Court Act 1981, s 31[1], quoted by Bradley and Ewing, *supra* note 12, on page 760.

<sup>234</sup> These orders overturn an invalid decision that has already been made. See Cane, *supra* note 17, on page 82.

<sup>235</sup> These orders prevent a public body from taking an unlawful decision or action. See Cane, *supra* note 17, on page 83.

<sup>236</sup> These orders require the performance of a duty. See Cane, *supra* note 17, on page 84.

<sup>237</sup> Declarations require that the court declares what law is. See Cane, *supra* note 17, on page 89.

<sup>238</sup> They prevent an illegal act or enforce the performance of a duty. See Cane, *supra* note 17, on page 86.

<sup>239</sup> This is compensation on grounds of the unlawful interference of the administration. See Cane, *supra* note 17, pages 94-100.

French system<sup>240</sup> through public law remedies such as *le contentieux de l'annulation*,<sup>241</sup> *le contentieux de pleine juridiction*,<sup>242</sup> *le contentieux de l'interprétation*,<sup>243</sup> and *le contentieux de la répression*.<sup>244</sup> Nevertheless, the final objective of these different legal mechanisms or remedies is, despite their different functions, to pursue a declaration of the administration's acts as invalid, unlawful, null, or void.

The operation of this reviewing system is mainly activated 'when an individual seeks to review the legality of a decision taken by a public authority or a specialized tribunal and the court must in exercise of this supervisory jurisdiction [as secondary jurisdiction] decide whether to uphold or set aside the decision'.<sup>245</sup> It is also activated when an individual seeks compensation as a consequence of the governmental liability for the unlawful or arbitrary decisions taken which infringe the rights of an individual.<sup>246</sup>

As an administrative review mechanism, judicial review is another, perhaps the most important reviewing forum to control the administration's actions, because the most essential function of the judiciary is to protect individuals against unlawful or arbitrary acts of the government.<sup>247</sup>

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<sup>240</sup> See Neville Brown and Bell, *supra* note 12, pages 175-180; Rivero, *supra* note 102, pages 227-234; and A. R. Brewer-Carias, *La Jurisdicción Contencioso Administrativa en Venezuela* (Editorial Jurídica Venezolana, Caracas 1983).

<sup>241</sup> The complainant seeks the annulment of an administrative act or decision on the ground of its illegality. See Neville Brown and Bell, *supra* note 12, on page 177.

<sup>242</sup> The complainant goes beyond illegality and is concerned with aspects of fact and law, which basically may go beyond quashing the administrative decision and involve revising it. See Neville Brown and Bell, *supra* note 12, on page 177.

<sup>243</sup> The administrative court is called upon to interpret administrative decisions in the sense of explaining its legal meaning or significance. See Neville Brown and Bell, *supra* note 12, on page 178.

<sup>244</sup> The administrative court acts as a criminal court in order to impose a fine, not imprisonment. See Neville Brown and Bell, *supra* note 12, pages 179-180.

<sup>245</sup> See Bradley and Ewing, *supra* note 12, on page 670.

<sup>246</sup> *Ibid.*, on page 670.

<sup>247</sup> *Ibid.*, on page 89.

In this regard, the judicial control of executive action is based on grounds of the *principle of legality*<sup>248</sup> which means '[the presupposition of] the existence of judges who [must] impose the administration [to obey] to the law'.<sup>249</sup>

Nonetheless, the remarkable difference between the French and British systems arises from the type of judges who decide the regulatory dispute and the law that they should apply.<sup>250</sup> On the one hand, under the French system, the regulatory dispute is reviewed mainly by special judges and a special body of law such as the judges of the administrative-contentious jurisdiction and the norms of public law. On the other hand, under the British system, the regulatory dispute is reviewed by ordinary civil courts in accordance with judge made law and the principles of private law.<sup>251</sup>

Another legal aspect of the French system is the predominant inquisitorial-adversarial nature of the court procedures through which the court will pursue an independent investigation of law and allow for the opportunity to hear the other party's position. This stands in stark contrast to the British civil court proceedings, which are predominantly adversarial. However, it is important to highlight here that both legal systems have the same final objective of administering justice.<sup>252</sup>

Under both legal systems, administrative court procedures<sup>253</sup> can be generally divided into four procedural steps: (a) commencement of proceedings,<sup>254</sup> (b) instruction,<sup>255</sup> (c)

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<sup>248</sup> Ibid., on page 784.

<sup>249</sup> See Neville Brown and Bell, supra note 12, on page 44.

<sup>250</sup> As P. Cane said '[t]raditionally in Britain the courts have lacked the power to review primary legislation' [which can certainly done by courts under the French system]. See Cane, supra note 17, on page 28.

<sup>251</sup> However, in terms of public law the judge-made law can run the risk of being misapplied by judges, so '[a]s Lord Diplock warned in 1981: "Any judicial statements on matters of public law if made before 1950 are likely to be misleading guide to what the law is today."' Quoted by Bradley and Ewing, supra note 12, on page 725.

<sup>252</sup> The procedure is essentially a written one. See, e.g., Neville Brown and Bell, supra note 12, on page 89.

<sup>253</sup> Administrative Procedure Act of 1976 (UK).

<sup>254</sup> See Neville Brown and Bell, supra note 12, on page 170.

judgment, and (d) execution. However, it is important to note that before commencing any judicial process, it is necessary to consider the reviewable nature of the administrative act (see theory of ‘ripeness’<sup>256</sup>) to allocate it within the area of special jurisdiction if applicable.

Furthermore, besides this essential and conditional requirement, certain conditions must be met before the judge can proceed to evaluate the merits of the case. These conditions are: (i) the nature of the act under review; (ii) the role of the ‘prior decision’ (primary jurisdiction’s decision); (iii) the *locus standi* (sufficient interest<sup>257</sup>) of the plaintiff; (iv) the absence of parallel relief; and, (v) the time limits for commencing proceeding.<sup>258</sup>

As a final remark, it should also be stressed that another important legal characteristic of the judicial review proceedings is the fact that there must be an absence of parallel relief,<sup>259</sup> i.e., by a way of exception; the judicial review is applied to certain circumstances where alternative remedies do not exist.<sup>260</sup>

This principle of the absence of parallel relief is homogenously applied within both legal systems. This refers to the existence of other suitable legal resolutions available under the British system, such as right to appeal and ombudsmen, and to other administrative resources that are available under the French system to challenge the

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<sup>255</sup> With regard to the instruction stage, the written procedure may involve a number of elements: requests for additional information from the parties, expert reports, site visits, inquiries and further questioning. Ibid., on page 95.

<sup>256</sup> See supra note 195.

<sup>257</sup> See details on ‘sufficient interest’ in Bradley and Ewing, supra note 12, pages 769-771.

<sup>258</sup> See Neville Brown and Bell, supra note 12, on page 157; and Bradley and Ewing, supra note 12, on pages 759-783.

<sup>259</sup> *R v Paddington Valuation Officer, ex p Peachey Property Co* [1966] 1 QB 380, quoted by Bradley and Ewing, supra note 12, on page 771.

<sup>260</sup> *Leech v Deputy Governor of Parkhurst* [1988] AC 533, quoted by Bradley and Ewing, supra note 12, on page 771.

public authority's decision within administration itself, such as the method of reconsideration and revision.<sup>261</sup>

### iii. Administrative justice

In the last fifty years, administrative justice has evolved in harmony with the development of administrative law.<sup>262</sup> Within this context, it can be seen that the discussion on the generic scope of administrative justice has been basically divided into two species: (i) justice within the public administration; and, (ii) justice of the public administration.<sup>263</sup>

The first is understood as a set of institutions whose main objective is to ensure the due observance of the law within public administration. The second represents one of the public functions of the state, which has as its main objective the application of administrative norms to disputes between the public administration and individuals towards activating judicial control.

Despite the alleged *contradictio in terminis* of the name administrative justice,<sup>264</sup> its definition may vary slightly from one jurisdiction to another in terms of the applicable jurisdiction. Nonetheless, the core theme and notion of administrative justice is still the same with regard to rendering the principle of legality effective and ensuring its due observance. This exercise can be carried out through the principles and resolutions available to aggrieved individuals to challenge the administration's decisions, before the administration itself, before traditional judicial control action is taken.<sup>265</sup>

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<sup>261</sup> See Bradley and Ewing, *supra* note 12, on page 771.

<sup>262</sup> See García de Enterría, E., *Hacia una nueva Justicia Administrativa* (Segunda Edición Ampliada, Editorial Civitas, S.A., Madrid 1992).

<sup>263</sup> See Sarria Olcos, *supra* note 107, on page 929.

<sup>264</sup> See Bradley and Ewing, *supra* note 12, on page 693.

<sup>265</sup> *Ibid.*, on page 660.

The British Tribunal, Court and Enforcement Act 2007, defines administrative justice as ‘the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including – (a) the procedures for making such decisions, (b) the law under which such decisions are made, and (c) the systems for resolving disputes and airing grievances in relation to such decisions’.<sup>266</sup> Similarly, as part of the continental administrative legal regime, Otto Mayer stated that ‘due to its nature, administrative justice concerns the delivery of decisions by the public authorities of the administrative organization.’<sup>267</sup>

Now, taking into consideration the notion of administrative justice and the fact that the public administration is subject to the principle of legality, as are its actions, it is the public administration itself that would have the primary interest in amending its own mistakes before it is exposed to the censure of judges.<sup>268</sup>

In this regard, it used to be argued that the French administrative system favoured the administration whereas the British administrative system provided better protection to individuals.<sup>269</sup> However, currently this distinction between the systems seems to be merging through the idea that ‘general rules set up a tension between social objectives and individual interests, decision-makers, in exercising judgement and discretion, are in a position to resolve this tension in various different ways, favouring either the social objective of the rule on the one hand, or the interest of an affected individual on the other.’<sup>270</sup>

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<sup>266</sup> Quoted by Cane, *supra* note 75, on page 210.

<sup>267</sup> O. Mayer, *Derecho Administrativo* (Tomo I, Parte General, Editorial Depalma, Buenos Aires, 1949), on page 220. Reference translated into English by author.

<sup>268</sup> See Rivero, *supra* note 102, on page 229.

<sup>269</sup> See Bradley and Ewing, *supra* note 12, on page 99.

<sup>270</sup> See Cane, *supra* note 75, on page 12.



In summary, there is a tendency to consider administrative justice as ‘a separate part of the justice system in its own right’<sup>271</sup> as well as to classify justice in three categories: administrative justice, legislative justice and judicial justice, despite the unique and incontestable notion of justice as ‘the first virtue of social institutions’.<sup>272</sup>

#### **f. Principles of administrative law**

It has been said that *principles of law* in general are mandatorily observed by the public administration throughout the exercise of its powers.<sup>273</sup> For this reason, disregard for these principles by the administration or any tribunal or court compromises the legality of its decisions, and consequently gives rise to its liability if a private individual is aggrieved.<sup>274</sup>

Despite the fact that much of substantive law regulating public administration is currently expanding towards the tendency to be contained in legislation – often consolidated into codes or acts – the majority of the principles of administrative law, under both legal systems, have been predominantly created in case law due to the process of induction from the judicial practice of the administrative tribunals and courts.<sup>275</sup>

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<sup>271</sup> *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007*, Consultation Paper CP 30/07 (London, Ministry of Justice), quoted by Cane, *supra* note 75, on page 210.

<sup>272</sup> J. Rawls, *A Theory of Justice* (Original Edition, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London England, 2005), on page 3.

<sup>273</sup> For an extensive explanation of the general principles of law and their influence on administrative law, see Neville Brown and Bell, *supra* note 12, pages 216-267; and Moles Caubet, *supra* note 12, on page 38.

<sup>274</sup> See Rivero, *supra* note 102, on page 81.

<sup>275</sup> See Neville Brown and Bell, *supra* note 12, on page 175.

In this regard, it has been said that before the enormous proliferation of administrative norms and decisions, as well as the lack of a homogenous and unanimously admitted criteria, the influence of principles of law has similar authority to the law.<sup>276</sup>

Furthermore, it has been also argued that the validity and applicability of the legal premise: ‘the law reigns, but the judicial precedent governs’, is more likely to be applied to administrative law through principles of law than can be achieved in any other branch of law.

On the other hand, it has been stated that judges are neither creators of law nor interpreters of general principles of law, but that they guarantee the due observance of the concrete precept of the law.<sup>277</sup> So, as E. Letourneur said: ‘the administrative judge is not a creator of norms, but he is, as any judge, subjected to the law; however when he applies unwritten general principles, he does so in accordance with the intention and spirit of the lawmaker’.<sup>278</sup>

Hence, administrative law principles are created and sustained by dynamic administrative law decisions (i.e., through administrative or judicial reviews). In fact, these principles are vividly applied to day-to-day public administration activity as well as to the judicial control of the public administration decisions.

One of the main problems with the principles of administrative law is the difficulty that it represents for public law lawyers a need to draw a line or boundary between the scope of each of these principles. It is due to the interconnected nature of these principles, mainly their interrelation with the principle of legality, that it is quite

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<sup>276</sup> V. Palasi, Apuntes de Derecho Administrativo – Parte General (Tomo I, Universidad a Distancia, Madrid, 1974), on page 558. See also C.E., 17 February 1950, *dame Lamotte, Gr. Ar.*, p. 336; quoted by Rivero, *supra* note 102, on page 82.

<sup>277</sup> See Rivero, *supra* note 102, pages 168-177.

<sup>278</sup> Étienne-François-Louis-Honoré Letourneur, quoted by Palasi, *supra* note 276, on page 558.

difficult for any legal expert to carry out a study of the boundaries of these principles within a few pages. Nonetheless, in this sub-section the author will try to summarize and draw the dividing line between the main principles of administrative law.

Additionally, as far as this research is concerned, it is important to highlight that, despite the fact that these administrative law principles are not codified or compiled in a single text but are split into many different legal instruments, this research is nevertheless intended to identify the most relevant principles of administrative law that have been recognized and applied to administrative law controversies. It is not the intention of this study however to create an exhaustive and detailed account of the principles of administrative law.

#### i. Principle of legality

The principle of legality is the foundation or pillar of any legal system that is represented either through the ‘government according to law’ or through the ‘rule of law’ from where other legal principles consequently derive or emanate.<sup>279</sup> For Example, in *R v Foreign Secretary ex p Bancoult*,<sup>280</sup> it was stated that the national constitution represented the foundation of the rule of law. It was also pointed out that there is a need for public administration to rely on an express delegation of power to regulate on specific issues to avoid accusations of illegality and/or abuse of power.

The meaning of this principle varies from the legal context where it is interpreted, e.g., it will depend upon the legal system – whether it is a socialist state or a judicial state.<sup>281</sup>

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<sup>279</sup> For more details about ‘*the rule of law and its implications today*’, see Bradley and Ewing, supra note 12, pages 93-106; Tamanaha, supra note 42, pages 86-90; and Schwartz, supra note 23, pages 109-113.

<sup>280</sup> [2001] QB 1067 (Divisional Court).

<sup>281</sup> See Bradley and Ewing, supra note 12, on page 100; and Moles Caubet, supra note 12, on page 8.

Nonetheless, despite this difference, the main aim of this principle mainly refers to the ‘fact that the administration must be compelled to observe [and obey] the law’.<sup>282</sup> That is to say, that every simple act of the administration at any level is subject to this principle.<sup>283</sup> For example, the Venezuelan Supreme Tribunal of Justice, in its decision 00218 (Tamanaco Advertising, C.A. v. Ministry of Infrastructure) states that ‘the conduct of the administration must be subordinate to the law’.<sup>284</sup>

With regard to this premise, it has been said that the practical meaning of this principle is based on the hierarchical character of the rules of law (i.e., M. Hauriou’s doctrine on the principle of legality as a ‘legal set of laws and regulations’).<sup>285</sup> For example, in *R. v Secretary of State for the Home Department Ex p. Pierson*,<sup>286</sup> it was stated that the principle of legality ‘applies with equal force to protect substantive basic or fundamental rights’. As mentioned before, this premise basically repeats the obligation of the government to act according to law otherwise its actions will not be valid.

In this regard, Hauriou’s doctrine can be better understood through Hans Kelsen’s legal pyramid which establishes a hierarchical relationship between higher (i.e., the Constitution) and lower (i.e., administrative acts) norms in which, according to the level of their location, the lower norm must respect the higher one. Nevertheless, whatever the position of the legal act, it is an indubitable part of the ‘legal set of law and regulations’.<sup>287</sup> For example, in *R v Lord Chancellor* it was stated that ‘[a constitutional right] cannot be abrogated by the state save for a specific provision in an

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<sup>282</sup> See Neville Brown and Bell, *supra* note 12, on page 213; and Moles Caubet, *supra* note 12, on page 11.

<sup>283</sup> See Goodnow, *supra* note 2, on page 2.

<sup>284</sup> Decision No. 00218 of 19 February 2008. Political-Administrative Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>285</sup> See Rivero, *supra* note 102, on page 84; and Maurice Hauriou, *Précis de Droit Administratif et de Droit Public* quoted by G. Perez Luciani, *El Principio de Legalidad* (Serie Estudios 81, Académica de Ciencias Políticas y Sociales, Venezuela 2009), on page 11.

<sup>286</sup> [1998] A.C 539: (House of Lords).

<sup>287</sup> See H. Kelsen, *Teoría Pura del Derecho* (Editorial Universitaria de Buenos Aires, Argentina 1981). See also Rivero, *supra* note 102, on page 84.

Act of Parliament, or by regulations whose *vires* in main legislation specifically confers the power to abrogate'.<sup>288</sup>

Regarding the principle of legality as '*principium est primum*' (i.e., a proposition with value of an axiom from which other principles derive), its application is imposed to any act that is entrusted to the judicial control of judges.<sup>289</sup> Moreover, the public administration, as part of the state unit, is also compelled to observe the principle '*tu patere legem quam ipse fecisti*'<sup>290</sup> which basically requires the administration to respect the law that it created itself.

Additionally, when this principle refers to the fact that the administration's acts must respect the law that is above it, it embraces two points. Firstly, the act must be in accordance with the dispositions that are directly related to it, mainly including the conditions of jurisdiction and the form that may condition the validity of the act. Secondly, the act, by its very nature, must respect the superior law applicable to the same subject. To this end, the act cannot contradict the superior law, either in an express or implicit manner; it can only complement and adapt them either to concrete situations, or apply them to a particular case.<sup>291</sup> For example, in *R v Secretary of State for the Home Department*,<sup>292</sup> it was stated that 'fundamental rights cannot be overridden by general or ambiguous words'.

It is important to highlight in relation to this situation that in private law, individuals can do whatever is not prohibited by law, whereas in public law and in accordance with

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<sup>288</sup> *Ex parte Witham* [1998] 2 W.L.R. 849 (Queen Bench Division).

<sup>289</sup> See Moles Caubet, *supra* note 12, on page 9; and Rivero, *supra* note 102, on page 85.

<sup>290</sup> See Neville Brown and Bell, *supra* note 12, on page 215.

<sup>291</sup> See Rivero, *supra* note 102, on page 86.

<sup>292</sup> *Ex parte Simms* [2000] 2 A.C 115: (House of Lords).

the principle of legality the administration can only carry out acts that the law permits.<sup>293</sup>

Despite the same final aim and meaning of the principle of legality under both the French and British systems, i.e., the activity of government acting through law; it is important, by a way of illustration, to point out that under the British system the principle of legality known as ‘government according to law’ is a part of the concept of the ‘rule of law’ which even goes beyond the principle of legality.<sup>294</sup>

Furthermore, it has been argued that administrative law ‘is wholly inconsistent with the rule of law’ with regard to the concept of the dual role of the state, which basically rejects the dualistic quality of the administration of justice.<sup>295</sup> However, as previously mentioned, the distinction and implication of the rule of law is not more than ‘the pure and indubitable subjection of everyone to the law’, which, in the end, has the exact scope as the principle of legality as it exists in the French system.<sup>296</sup>

Furthermore, some authors have said that the fundamental point of this distinction is found in the vestiges of Dicey’s doctrine about the rule of law and his resistance to the *Droit Administratif* (Administrative law).<sup>297</sup> Nonetheless, this may provide grounds for a legal discussion that goes beyond the main scope and purpose of this research.

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<sup>293</sup> See Neville Brown and Bell, *supra* note 12, on page 277.

<sup>294</sup> This seems to be an internal discussion in Great Britain, where the lack of a written constitution can represent the lack of an organic instrument to limit the lawmaking authority of Parliament; therefore, it may give grounds to the misconception of the notions of rule of law and principle of legality, by assuming the priority of the first over the second. See Schwartz, *supra* note 23, on page 109; and Bradley and Ewing, *supra* note 12, on pages 100 and 101.

<sup>295</sup> Schwartz, *supra* note 23, on pages 59 and 311.

<sup>296</sup> *Ibid.*, on page 111.

<sup>297</sup> For more details about ‘the rule of law and its implications today’, see Bradley and Ewing, *supra* note 12, pages 93-106; Vélez García, *supra* note 3, pages 61-62; and A. V. Dicey, *Law of the Constitution* (Ed. ECS Wade), 10<sup>th</sup> edn, 1959; quoted by Bradley and Ewing, *supra* note 12.

## ii. Principle of the public administration's discretionary power

The Barron's Law Dictionary defines the word 'discretion' as 'the reasonable exercise of a power or right to act in an official capacity; involves the idea of choice'.<sup>298</sup> In this context, it is noteworthy to mention here that in *Roberts v Hopwood*<sup>299</sup> it was stated that 'the discretion conferred upon the council by the statute was not an uncontrolled discretion and must be exercised reasonably'.

In this regard, any act of the administration is subject to at least two minimum conditions that are imposed by law. The first is related to the capacity of the public administration, i.e., the competent authority to dictate the act. The second is based on the aim pursued by the public administration, i.e., the fact that such aim must be grounded in the public interest.<sup>300</sup>

This principle is an extension of principle of legality that applies to all elements of the administration's activities, especially regarding the legal capacity of the public administration. This legal capacity is founded upon and derived from another principle known as 'authorised delegation'. In other words, this latter principle basically imposes on the public administration through the conditions established in a determined legislative act, the obligation of deciding in a certain way (i.e., discretion) with due observance of law.<sup>301</sup> For example, in *Bushell v Secretary of State for the Environment*,<sup>302</sup> it was stated that 'in exercising... discretion, as... exercising any other administrative function, [officials] owe a constitutional duty to perform it fairly and honestly and to the best of their ability...'

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<sup>298</sup> S. H. Gifis, *Law Dictionary* (Barron's Legal Studies, USA 1996), on page 147.

<sup>299</sup> [1925] A.C 578.

<sup>300</sup> See Rivero, *supra* note 102, on page 88.

<sup>301</sup> *Ibid.*, on page 87.

<sup>302</sup> (1981) A.C 75.

It has been said that the exercise of this discretion is not contradictory to the principle of legality.<sup>303</sup> Conversely, it is based on the idea of promoting the public interest and also giving the public administration a certain flexibility to adapt its performance to those vivid, dynamic and changing realities it has to face, particularly in cases that could not have been foreseen.

This adaptation to the current needs of public administration is known as the ‘principle of opportunity’. However, this exercise can incur some extra limitations of power by the administration. This extra limitation of power is known as the abuse of power of the administration (i.e., *d’excès de pouvoir*<sup>304</sup> in France and *ultra vires*<sup>305</sup> in Britain).

The grounds for the determination of validity of a given administrative action carried out by excess of power must be – in any case – based on and in accordance with the law. This determination of validity also involves the pre-established conditions that were enacted to allow the administration to exercise such vested discretion and flexibility (i.e., freedom to appreciate or discretionary power).<sup>306</sup>

Following the British administrative doctrine on discretionary power which states that ‘in exercising discretion, an official or public body may (intentionally or inadvertently) make a decision or embark on action which the court considers to be unlawful’<sup>307</sup>, there are also other related principles which can be found, that may give grounds for the review of such action by the court.

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<sup>303</sup> See Rivero, *supra* note 102, on page 89.

<sup>304</sup> See Neville Brown and Bell, *supra* note 12, on page 239.

<sup>305</sup> See Bradley and Ewing, *supra* note 12, on page 727; and Schwartz, *supra* note 23, pages 200-203.

<sup>306</sup> The abuse of power doctrine does not apply to acts of *jure imperii*, i.e., acts by right of dominion (e.g., acts of parliament). See Bradley and Ewing, *supra* note 12, on page 727. See also *R (Keating) v Cardiff Local Health Board* [2005] EWCA Civ 847; quoted by Bradley and Ewing, *supra* note 12, on page 728; and Kornprobst, *La compétence liée*, R.D.P., 1961, page 935; quoted by Rivero, *supra* note 102, on page 87.

<sup>307</sup> See Bradley and Ewing, *supra* note 12, on page 729.



For example: (i) the principle of irrelevant considerations which is based on the fact that a decision-maker may or may not take ‘into account factors that in law are irrelevant or leaves out of account relevant matters’;<sup>308</sup> (ii) the principle of improper purposes which refers to the ‘malice or personal dishonesty on the part of the officials making the decision’;<sup>309</sup> (iii) the principle of error of law that compels the administration to ‘direct itself properly on the law or its decision may be declared invalid’<sup>310</sup>; (iv) the principle of unauthorised delegation (*delegatus non potest delegare*); which is applicable to those cases where a public entity tries to sub-delegate on grounds of its discretion to another entity the power that was entrusted to it by a determined statute;<sup>311</sup> and, (v) the principle of unreasonableness (irrationality) that refers to the decision of a judge to set aside an official decision because it was ‘so unreasonable that no reasonable authority could ever have come to it’, known in Britain as the ‘Wednesbury’ principle.<sup>312</sup>

### iii. Principle of proportionality

The principle of proportionality currently represents the most common cause for challenging a public administration decision and it is an expanding legal argument that is used in order to challenge ‘a discretionary policy choice made by the administration’.<sup>313</sup> For example, in *Council of Civil Service Unions v Minister for the*

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<sup>308</sup> See, e.g., *R v Home Secretary, ex p Venables* [1998] AC 407; *R v Talbot Council, ex p Jones* [1988] 2 All ER 207; quoted by Bradley and Ewing, *supra* note 12, on page 731.

<sup>309</sup> ‘Most instances of improper purpose have arisen out of a mistaken interpretation by a public authority of its powers’, See Bradley and Ewing, *supra* note 12, on page 731. See also *Municipal Council of Sydney v Campbell* [1925] AC 338; *Congreve v Home Office* [1976] QB 629, 662 (Geoffrey Lane LJ), quoted by Bradley and Ewing, *supra* note 12, on page 731.

<sup>310</sup> See *R v Home Secretary, ex p Venables* [1998] AC 407; quoted by Bradley and Ewing, *supra* note 12, on page 731.

<sup>311</sup> *Barnard v National Dock Labour Board* [1953] 2 QB 18; quoted by Bradley and Ewing, *supra* note 12, on page 733.

<sup>312</sup> See Jowell and Lester, *supra* note 231, on page 735.

<sup>313</sup> The concept of proportionality emerged from criminal law, specifically as a needed element in the legitimate defence. Rivero, *supra* note 102, on page 571. Afterwards, it was transposed to administrative law. See CE 8 December 1972, *Ville de Dieppe* and *R v Barnley Metropolitan Borough Council* [1976] 1 WLR

Civil Service,<sup>314</sup> the need to analyze this principle was emphasized. That is to say, following the *obiter dicta* set out in this case, the principle may become a separate ground of review in the future. Nonetheless, under the British system, subsequent decisions have rejected the principle of proportionality as a separate ground for judicial review where human rights were not involved.<sup>315</sup>

In fact, this principle is not only connected to the principle of legality, but also to the principle of discretionary power of public administration (i.e., fairness).<sup>316</sup> An explanation of this linking process is found in the idea that ‘if [an] action to achieve a lawful objective is taken in a situation where it will restrict a fundamental right, the effect on the right must not be disproportionate to the public purpose sought to be achieved’.<sup>317</sup> For example, in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,<sup>318</sup> the role of the court was questioned with regard to the application of this principle. It was stated that ‘where a public authority making a decision had only taken into account the matters it ought to have taken into account, the court could still interfere with the decision where it was so unreasonable that no reasonable authority could ever come to it’.

In this situation, it was said that this principle ‘requires a certain portion or balance between the administrative measure taken and the aim to be achieved’.<sup>319</sup> Indeed, this

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1052, quoted by Neville Brown and Bell, *supra* note 12, pages 37-5, 234 and 235. See also P. Craig, *EU Administrative Law* (Oxford University Press, UK 2006), on page 658.

<sup>314</sup> [1985] AC 374 (House of Lords)

<sup>315</sup> See, e.g., *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (House of Lords) and *Sommerville v Scottish Ministers* [2008] S.C (H.L) 45 : (House of Lords).

<sup>316</sup> J. A. Usher, *General Principles of EC Law* (European Law Series, Addison Wesley Longman Limited, England 1998), on page 37.

<sup>317</sup> See Bradley and Ewing, *supra* note 12, on page 737.

<sup>318</sup> [1948] 1 KB 223: (Court of Appeal).

<sup>319</sup> See Neville Brown and Bell, *supra* note 12, on page 233.

principle seems to represent a premise which states that ‘proportionality of a measure is something different from its necessity’.<sup>320</sup>

An example of this argument can be found in Decision 01202, *Aserca Airlines v. Ministry of Infrastructure*, of the Political-Administrative Chamber of the Supreme Tribunal of Justice of Venezuela. In this case, when the court referred to the proportionality of a penalty given to the Claimant by the Ministry, it stated that ‘the principle of proportionality orders that the measures adopted by an administrative body must be proportional to the facts performed by the infringer’. In the same regard, the court also states that ‘the principle of proportionality constitutes an exigency for the administration to appreciate *a priori* the factual situation and the aim pursued by the norm’.<sup>321</sup> A similar example is also found in decision 00481, *PDL Construcciones, C.A. v. Servicio Nacional de Contrataciones*, of the same chamber of the Venezuelan Supreme Tribunal. In this particular case, when the tribunal referred to the discretionary power of the administration to grant provisional measures, it stated that ‘the prudential activity of the administration must be subject to the principle of proportionality’.<sup>322</sup>

For a better understanding of this latter statement, it can be useful to understand W. Jellinek’s example and his own explanation on the idea of necessity and proportionality in which he proposed a double scale of gravity:

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<sup>320</sup> See Craig, *supra* note 312, on page 658. Reference translated into English by author.

<sup>321</sup> Decision No. 01202 of 03 March 2002. Political-Administrative Chamber, Supreme Tribunal of Justice (Venezuela). Reference translated into English by author.

<sup>322</sup> Decision No. 00481 of 21 March 2007. Political-Administrative Chamber, Supreme Tribunal of Justice (Venezuela).

Gravity of the situation	Gravity of the measure
10	10
9	9
8	8
7	7
6	6
5	5
4	4
3	3
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2	2
1	1
0	0

**Source:** Rivero, J., (1984).

According to this graph, it is stated that the gravity of the situation is equal to the sacrifice that the community would have to make if the measure were not adopted. In other words, the gravity of the measure is the sacrifice of the rights related to the individual to whom the measure is applied. The gradation must be parallel (so an 8 corresponds an 8) and the measure is necessary. Below a certain grade of gravity, for example, the principle '*de minimis non curat praetor*' (law does not care about trivial things) is applied; i.e., regarding the measures, the exercise of the authority is no longer necessary.<sup>323</sup>

Further to this, it has also been argued that in a democratic society, it is necessary that the adoption of any public administration measure must comply with the restrictions that are prescribed by law, and also that such an adoption must be accepted for specified public purposes.<sup>324</sup>

<sup>323</sup> See Rivero, *supra* note 102, on page 571. Translated into English by the author.

<sup>324</sup> Article 10(2) of the European Convention on Human Rights, quoted by Bradley and Ewing, *supra* note 12, on page 737.

Moreover, where a right is restricted on the grounds of public interest, such a restriction ‘must be necessary and proportionate to the damage which the restriction is designed to prevent’.<sup>325</sup>

Additionally, it has been said that the principle of proportionality is not a consequence of the fundamental right to freedom, but a consequence of the principle of legality.<sup>326</sup> Therefore, this principle represents ‘the delimitation through appreciation of the authority’s sphere’. It has been said that the application of this principle can be done either through general criteria (in absence of law) or through express mandate of the law.<sup>327</sup>

#### iv. Principle of legal certainty and legitimate expectations

The principle of legal certainty refers to the necessary protection of an individual’s rights before any discretionary act of the administration.<sup>328</sup> In this regard, for example, the Venezuelan Supreme Tribunal of Justice, in its decision No. 3180 (TECPICA, C.A. v. Venezuela) of the Constitutional Chamber, asserted that ‘legal certainty refers to the quality of the juridical system. That is to say, it implies the certainty of the norms and their application’. Similarly, the same tribunal states that ‘[this principle] pursues the existence of legitimate expectation of the people of the country in their juridical system and its subsequent application’. Finally, the tribunal states that ‘this principle embraces the acquired rights of the people which cannot be infringed arbitrarily when the law is required to be changed by another law or amended’.<sup>329</sup>

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<sup>325</sup> See, e.g., *R v Home Secretary, ex p Brind* [1991] 1 AC 696, 751 (Lord Templeman), quoted by Bradley and Ewing, *supra* note 12, on page 737.

<sup>326</sup> Georges Jellinek, Thomas and Rupprencht von Kraus, quoted by Rivero, *supra* note 102, on page 571.

<sup>327</sup> See Rivero, *supra* note 102, on page 571.

<sup>328</sup> Rivero, *supra* note 102, on page 565. See also Usher, *supra* note 316, pages 52-71.

<sup>329</sup> Decision No. 3180 of 15 December 2004. Constitutional Chamber, Supreme Tribunal of Justice (Venezuela).

This principle also refers to the individual's belief that he/she may have 'a justified expectation to obtain from another person, a favourable abstention or declaration to his/her interests'.<sup>330</sup> In this particular situation, the Venezuelan Supreme Tribunal of Justice states, in Decision 3057 (*Seguros Altamira v. Venezuela*) of the Constitutional Chamber, that 'this principle implies the legitimate expectation of private individuals that the state will act in the same manner as it has been acted, before in relation to a similar circumstances'.<sup>331</sup> Following this same line of thought, in *R v Inland Revenue Commissioners*,<sup>332</sup> it was stated that 'the doctrine of legitimate expectation is rooted in fairness but fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled to as the citizen'.

In this regard, the conduct that gives rise to the expectation is not only constitutes actions, but also certain abstentions and refusing manifestations or voluntary omissions (e.g., rules related to the introduction of new norms, to the stability of juridical situations, to the principle of participation, to the exercise of discretionary power, to the contractual regime of the administration, and to the liability of the administration).<sup>333</sup> Furthermore, it has been said that the action by the administration must be performed in accordance with pre-established rules and known by the individuals (i.e., principle of predictability).<sup>334</sup>

Additionally, this principle is closely connected to the principle of legitimate expectations (*confiance légitime*) and at the same time it is endowed with an aspect of

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<sup>330</sup> H. Rondon de Sanso, *Dos Temas Innovadores – Confianza Legítima y el Principio de Precaución en el Derecho Administrativo* (Hildegard Rondon de Sanso, Caracas 2006), on page 3.

<sup>331</sup> Decision No. 3057 of 14 December 2004. Constitutional Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>332</sup> [1990] 1 W.L.R. 1545 (Queens Bench Division).

<sup>333</sup> For an extensive study of legitimate expectations, see Rondon de Sanso, *supra* note 330.

<sup>334</sup> A. R. Brewer Carías, *Principios del Procedimiento Administrativo en América Latina* (Universidad del Rosario, Editorial Legis, Colombia 2003), on page 279.

legal certainty.<sup>335</sup> The protection of legitimate expectations has been well established in British law and has been recently recognised in French law.<sup>336</sup>

One common point shared by the British and French systems, is that in a case involving the revocation of a decision the public administration may exercise its discretion but must take into consideration that such action ‘may not alter the decision to the individual’s disadvantage’.<sup>337</sup> Furthermore, such revocation must be done on the basis of and in accordance with the express statutory provision.<sup>338</sup> Nevertheless, there is a point of disagreement between these two systems related to a ‘breach of an assurance’.<sup>339</sup> According to the Barron’s Law Dictionary, assurance or covenant means ‘an agreement or promise to do or not to do a particular thing’.<sup>340</sup>

In the context of this definition, under the British system, an assurance which is given by the administration to an individual, even though the relevant legislation does not expressly refer to such an assurance, may constitute a well established ground for the enforcement of the legitimate expectations created by such an assurance.<sup>341</sup> For example as in *R. v Secretary of State for the Home Department Ex p. Oloniluyi*,<sup>342</sup> it was argued that an immigration officer could not refuse to admit a Nigerian citizen

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<sup>335</sup> For a detailed study of legitimate expectations in administrative law, see S. Schonberg, Legitimate Expectations in Administrative Law (Oxford University Press, UK). See also Bradley and Ewing, supra note 12, on page 753; Rondon de Sanso, supra note 330, on page 16; and Brewer Carias, supra note 334, pages 279-285.

<sup>336</sup> See, e.g., *Entreprise Transports Freymuth* (TA Strasbourg, 8 December 1994), quoted by Neville Brown and Bell, supra note 12, on page 235. See also Rondon de Sanso, supra note 330, on page 16.

<sup>337</sup> *Re 56 Denton Road Twickenham* [1953] Ch 51; quoted by Bradley and Ewing, supra note 12, on page 754.

<sup>338</sup> See Bradley and Ewing, supra note 12, on page 754.

<sup>339</sup> *Ibid.*, on page 754.

<sup>340</sup> S. H. Gifis, *Law Dictionary* (Barron’s Legal Studies, USA 1996), on page 116.

<sup>341</sup> Here a question may arise regarding the application of the rule or legal principle and the parliamentary supremacy principle in the United Kingdom, especially if the principal that ‘*no Parliament may bind its successors*’ is taken into consideration. See Bradley and Ewing, supra note 12, on page 60.

<sup>342</sup> [1989] Imm AR 135: (Court of Appeal: Civil Division) (Full text not available). See also Attorney-General of Hong Kong Appellant v Ng Yuen Shiu Respondent [1983] 2 W.L.R. 735 (Privy Council); and *R v Secretary of State for the Home Department ex parte Khan* [1984] 1 W.L.R. 1337: Court of Appeal).

because a verbal assurance had been given to her by an immigration officer which insured that she would be allowed to re-enter the UK.

Here, one may query the relationship between the British conception of legitimate expectations and the possible occurrence of an illegal assurance and whether this would be deemed to contradict the principle of legality. Conversely, under the French system, any assurance given by the public administration must be enshrined in written form and must be in accordance with an express provision of the law, which requires the fulfilment of express administrative formalities and proceedings.<sup>343</sup> The failure to adhere to these proceedings leaves the act to be quashed by the court. These principles of legal certainty and legitimate expectations raise ‘difficult questions as to how a court balances individual expectations against the necessity for official bodies to act in the public interest’.<sup>344</sup>

Finally, an important point to be stressed in this regard is the relationship between the principle of legitimate expectations and the legal doctrine of ‘estoppel’ (i.e., the doctrine that prohibits any revocation or contradictory actions to the detriment of other individuals).<sup>345</sup> Nonetheless, it has been said that this doctrine is not applicable to the public administration when it acts in accordance with its excessive powers or prerogatives.<sup>346</sup>

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<sup>343</sup> See Brewer-Carias, *supra* note 123, pages 74-97.

<sup>344</sup> See *R v North Devon Health Authority, ex p Coughlan*, [2001] QB 213; and, P. Craig and S. Schonberg [2000] PL 684, pages 698-700; quoted by Bradley and Ewing, *supra* note 12, on page 756.

<sup>345</sup> For an extensive and detailed study on the doctrine of estoppel and the administration, see H. A. Mairal, La Doctrina de los Propios Actos y la Administración Pública (Ediciones Depalma, Buenos Aires, 1994). See also Bradley and Ewing, *supra* note 12, on page 757.

<sup>346</sup> See Rondon de Sanso, *supra* note 330, on page 7; Bradley and Ewing, *supra* note 12, on page 757; Fox, *supra* note 56, on page 182; and Shalev, *supra* note 30, pages 465-467.



#### v. Principle of equality before the law

The principle of equality before the law emphasizes the same legal status applicable to all individuals (i.e., nationals and non-nationals) and the status which the public administration itself possesses under the conditions and circumstances established by the law, as well as the individual's rights to have access to, and the opportunity to benefit from, public services.<sup>347</sup>

In this respect, in Decision No 16238 of the Political-Administrative Chamber of Venezuelan Supreme Tribunal of Justice, it was said that true equality before the law is based on the idea that individuals should be subject to the same legal treatment that other individuals have, under the same legal circumstances and conditions (principle of 'vertical equality' within the administration<sup>348</sup>).<sup>349</sup> Similarly, in Decision 3057 (J. Reyes Gaterol v. Venezuela) of the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice, it was stated that individuals who are not in the same circumstances and conditions predetermined by law cannot be treated in a similar way because the law does not succumb to the particular interests of individuals, but the public interest.<sup>350</sup>

In the past, this principle was primarily perceived to abolish the discrimination between the sexes and nationalities, whereas today it is acknowledged globally that the majority

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<sup>347</sup> See, e.g., Decision No 16238 of 19 September 2002, Political-Administrative Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>348</sup> See Langrod, *supra* note 30, on page 360.

<sup>349</sup> See, e.g., Decision No 16238 of 19 September 2002, Political-Administrative Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>350</sup> See, e.g., Decision No. 3057 of 01 March 2007, Constitutional Chamber, Supreme Tribunal of Justice (Venezuela). See also *Syndicat Chretien Du Corps des Officiers de Police* (CE 21 April 1972); *Federation des Syndicats Generaux de L'Education Nationale* (CE 26 June 1989); *Compagnie Alitalia* (CE 3 February 1989); quoted by Neville Brown and Bell, *supra* note 12, pages 230-231.

of legal systems currently prohibit almost any kind of discrimination.<sup>351</sup> An example of this premise can be found in *Villalba v Merrill Lynch & Co Inc and others*<sup>352</sup> which involve allegations of sex discrimination and which were heavily reliant upon the relevant acts which prohibit such behaviour.

However, the use of this principle has constantly re-emerged when the administration has to face the provision and guarantee fair and equitable treatment to both nationals and non-nationals and has to deal with areas of the public domain.

An example of the economic impact of the use of this principle by the public administration can be taken from the principle of equality of public burdens, i.e., the case when the public administration (must) decide to increase or decrease a given tax in order to protect or promote the national economy and the public interest, and therefore, the national welfare.<sup>353</sup>

One may say that this principle seems to be more of a constitutional principle than an administrative principle. Nonetheless, it becomes important to the public administration's activities when it has to perform its functions under the scope of constitutional law precepts and the law in general.<sup>354</sup> This is especially the case if it is pointed out that the application of this principle has some economic impacts on the provision of public services as well as on the fair and equitable opportunities given to individuals to access such services.<sup>355</sup>

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<sup>351</sup> See Palasi, *supra* note 276, on page 573. See also *Syndicat Chretien Du Corps des Officiers de Police* (CE 21 April 1972); *Federation des Syndicats Generaux de L'Education Nationale* (CE 26 June 1989); *Compagnie Alitalia* (CE 3 February 1989); quoted by Neville Brown and Bell, *supra* note 12, pages 230-231.

<sup>352</sup> [2007] I.C.R. 469: (Employment Appeal Tribunal). See also *Defrenne v Sabena* (Case 43/75)[1976] ICR 547 para 12.

<sup>353</sup> See Palasi, *supra* note 276, on page 563.

<sup>354</sup> See Palasi, *supra* note 276, on page 561.

<sup>355</sup> See, e.g., *SA Des Grands Magasins Economiques* (CE 10 February 1937); quoted by Neville Brown and Bell, *supra* note 12, on page 229. See also Palasi, *supra* note 273, on page 563.

Finally, it has to be stressed that the violation of this principle may require two basic elements: (i) there must be various individuals who are subjected to exactly the same factual conditions; and (ii) different juridical consequences must be applied to each of these individuals.<sup>356</sup>

#### vi. Principle of the public administration's good faith

The foundation of this principle has its origin in the idea or intention of neither damaging anyone nor breaching the law.<sup>357</sup> In this regard, courts have assumed that the application of this principle is an obligation for the entire administration. For example, in *Board of Education v Rice*,<sup>358</sup> it was stated that 'the Board of Education will have to ascertain the law and also to ascertain the facts... in good faith'. If such a principle is adopted in such a manner, administrative acts can be vitiated. This latter observation was pointed out in *Roberts v Hopwood* where it was stated that 'bad faith admittedly vitiates the [public administration's] purposed exercise of its discretion'.

In administrative law, this principle is found in the transparent relationship between the state (public administration) and individuals. It has been said that both public administration and an individual's acts must be inspired by the respect for the principle of good faith as well in relation to the principle of equity.<sup>359</sup>

Similarly, it has also been argued that the major idea behind any public administration's decision is the duty to obey the law.<sup>360</sup> In other words, as a consequence of the expanding development of the public administration's decisions,

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<sup>356</sup> Decision 02-1589 of 19 December 2003, Constitutional Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>357</sup> See *Rondon de Sanso*, supra note 330, on page 21; *Usher*, supra note 316, on pages 101-103; and *Shalev*, supra note 30, on page 455.

<sup>358</sup> [1911] A.C 179.

<sup>359</sup> See *Brewer Carias*, supra note 334, on page 278; *Palasi*, supra note 276, on page 568; and *Rondon de Sanso*, supra note 330, on page 21.

<sup>360</sup> See *Palasi*, supra note 276, on page 568.

based on new finalities (it is good to remember here the dynamic nature of the administration) and social tasks, there has been an increase in the dependence of individuals on the administration. Therefore, this growing dependence, plus the limitation of freedom, can only be compensated with the wider applicability of the principle of good faith.<sup>361</sup> In fact, it has been stated that the principle which asserted that ‘ignorance of law is not an excuse’ applies not only to individuals, but also to the administration itself.<sup>362</sup>

To clarify this latter position, it has been stated that the applicability of the principle of good faith requires two determined positions: (i) a situation of trust and a formal appearance motivated by the conduct of the administration; and, at the same time, (ii) a situation of trust of the individual under the same situation of any administrative entity.<sup>363</sup> In this regard, it is important to point out as a corollary, the global acceptance of the principle of *bona fides semper praesumitur nisi mala adesse probetur* (i.e., good faith is always presumed as long as the contrary is not proven).<sup>364</sup>

#### vii. Principle of the duty to give reasons (motivation)

The principle of the duty to give reasons (motivation) has been introduced as a general principle to the administration’s activities, owing to the fact that it is considered to be ‘one of the fundamentals of good administration’.<sup>365</sup> For example, in *R. v Ministry of Defence Ex p. Murray*<sup>366</sup> it was stated that ‘while there was no general duty in law for decision making bodies to give reasons, in some case fairness would require that

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<sup>361</sup> Ibid., on page 568.

<sup>362</sup> Ibid., on page 568. See also Shalev, *supra* note 30, on page 455.

<sup>363</sup> See Brewer Carias, *supra* note 334, on page 278.

<sup>364</sup> See Rondon de Sanso, *supra* note 330, on page 22. See also Article 789 Venezuelan Civil Code.

<sup>365</sup> See, e.g., *Breen v Amalgamated Engineering Union and Others* [1971] 2 Q.B 175. See also Neville Brown and Bell, *supra* note 12, on page 233; Usher, *supra* note 316, on pages 110, 112, 118 and 120; and Bradley and Ewing, *supra* note 12, on page 752.

<sup>366</sup> [1998] COD 134.

reasons [should be] given'. Similarly, in *R v Secretary of State for the Home Department, Ex parte Doody*,<sup>367</sup> Lord Mustill asked whether 'refusal to give reasons is fair' and his immediate answer was 'no'.

Keeping these statements in mind, it can be inferred that this principle mainly requires that 'any administrative decisions must be accompanied by reasons'.<sup>368</sup> This principle is known as *pas de motivation sans texte* and has been a long accepted guideline under both the British and French legal systems.<sup>369</sup> However, this principle may not be applicable to certain types of administrative acts such as those inter procedural acts.<sup>370</sup>

In this regard, it has been stated that:

Individuals or legal persons have the right to be informed without delay of the reasons for individual administrative decisions which affect them unfavourably. To this end reasons must be given for decisions which: restrain public liberties or constitute a regulatory measure; impose a penalty; subordinate the grant of an authorization to restrictive conditions...; withdraw or restrict rights, set a time limit or foreclosure; refuse a benefit to which a person has a right if the legal conditions are met.<sup>371</sup>

Similarly, it has been also asserted at the (European) regional level that:

Regulations, directives and decisions adopted by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.<sup>372</sup>

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<sup>367</sup> [1994] 1 AC 531.

<sup>368</sup> See Brewer Carias, *supra* note 334, on page 225; Neville Brown and Bell, *supra* note 12, on page 31; and Bradley and Ewing, *supra* note 12, on page 697.

<sup>369</sup> See Neville Brown and Bell, *supra* note 12, on page 91.

<sup>370</sup> In the British legal system it has been argued that 'at common law there is no general duty to give reason for decisions', but '[d]espite the absence of general duty of give reasons, the courts often require reason to be given'; See Bradley and Ewing, *supra* note 12, on page 752; and Brewer Carias, *supra* note 334, on page 228.

<sup>371</sup> Article 1, Law of 11 July 1979, quoted by Neville Brown and Bell, *supra* note 12, on page 91.

<sup>372</sup> Article 253 European Community; quoted by Craig, *supra* note 313, on page 382.

In addition, it has been argued that this principle to give reasons may better equip individuals at the moment they challenge any administrative decision, especially if the legal rights of the individuals involved were infringed.<sup>373</sup> For example, in decision 00354 (J.O. Lucena Gallardo v. Ministry of Interior and Justice) of the Political-Administrative Chamber of the Venezuela Supreme Tribunal of Justice, it was stated that ‘the insufficient motivation of administrative acts only gives grounds to the nullity of the same by private individuals who were not allowed to know in advance the legal foundation and facts that motivated the administration to adopt these disputed administrative acts’.<sup>374</sup> A similar example is found in Decision 0859 (Maldifassi & CIA, C.A. v Ministry of Labour) of the same chamber of the Venezuelan Supreme Tribunal of Justice, when it was stated that ‘motivation is an essential requisite of validity of the administrative act’.<sup>375</sup> As Professor P. Craig pointed out, the duty to give reasons ‘is a salutary exercise’ because it does not only provide a more transparent process from the view point of aggrieved individuals, but also ensures that rationality of the administrative action to be taken into account.<sup>376</sup>

Finally, it has also been said that the ‘proper and adequate’ motivation of the administration’s decision must also include the factual and legal sources of such a decision which would also constitute a guarantee of the right of defence of individuals.<sup>377</sup> An example of this latter statement can be found in R v Civil Service

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<sup>373</sup> See, e.g., R v Home Secretary, ex p Fayed [1997] 1 All ER 228, quoted by Bradley and Ewing, *supra* note 12, on page 730. See also Craig, *supra* note 313, on page 382; Neville Brown and Bell, *supra* note 12, on page 91; and Brewer Carias, *supra* note 334, on page 226.

<sup>374</sup> Decision No. 00354 of 26 February 2002. Political-Administrative Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>375</sup> Decision No. 0859 of 23 July 2008. Political-Administrative Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>376</sup> See Craig, *supra* note 313, on page 382.

<sup>377</sup> This requisite may vary from one jurisdiction to another. See Brewer Carias, *supra* note 334, pages 225-228.

Appeal Board<sup>378</sup> where it was stated by Lord Donaldson that ‘decision-makers shall give reasons’ to support their administrative or juridical decisions.

### **g. Summary**

Under both the British and French administrative legal systems, the regulatory power of the state as state-regulator is mainly performed by the executive power (i.e., the government) through its public administration. Within this context, it has been illustrated that the relationship between private individuals and the public administration can be either unilateral or bilateral and can even involve excessive powers in favour of public administration.

Additionally, despite their different legal traditions and origins, both legal systems have the same goals and aims. These are (i) the regulation of an individual’s relationship with others and with the state, and (ii) the provision of legal mechanisms to protect individuals from the abuse of power by the administration.

These legal mechanisms exist at different levels and in different branches of the state (i.e., within the judicial and executive branches). These mechanisms have been conceived to review the administration’s actions or to resolve any regulatory dispute between an aggrieved individual and the administration. This controversy can arise as a consequence of the interplay between powers, duties and the discretion of the public administration.

The practice of reviewing the administration’s actions has given rise, under both legal systems, to essential principles of administrative law that have mainly derived from these case law practices such as principles of: legality, administration’s discretionary

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<sup>378</sup> [1992] I.C.R. 816.

power, proportionality, legal certainty and legitimate expectations, equality before the law, the public administration's good faith, and duty to give reasons, amongst others.

On the other hand, both legal systems have created, through specific enacted laws, the above-mentioned legal mechanisms of review. These mechanisms of review have been drawn up with the idea of providing private individuals with legal mechanisms to face the privileges of the administration and to protect their subjective rights. This creation has also been done in accordance with the principle of legality. This principle allows judges to have a full appreciation of the supremacy-subordination relationship that exists between public administration and private individuals.

The simple fact of having the public administration as a counterparty in any regulatory dispute makes the mechanism of settling disputes (i.e., internal and external reviews) subject to the principle of legality and to other related principles, including the excessive power of the administration. These principles are the natural principles applicable to acts of the public administration. Additionally, it can be also stressed that there is a common characteristic under both legal systems regarding the exercise of the regulatory power of the Crown in the benefit of his/her national public interest. That is to say that such regulatory power cannot be hampered even in the case of concluding public-law and private law contracts.

Finally, it is necessary to highlight the dynamic and uncoded nature of administrative law here. It is important to point out that when attending any regulatory dispute it is necessary to consider the following aspects (i) the changing realities that public administration has to face; and (ii) the legal nature of the case law which means that the principle when applied to regulatory disputes may vary from case to case as no situation is exactly the same.



Based on the above premises, the next question that will be dealt with is how these institutions and principles of domestic administrative law can be used as a reference or as a guide by investment arbitrators to understand the argued analogy of international regulatory disputes with these domestic law principles and institutions. Additionally, how ISTAs deal with regulatory issues arising in the current international investment arbitration system. These questions will be the subject of the subsequent chapters.

## CHAPTER III

### INTERNATIONAL INVESTMENT TREATIES – PUBLIC LAW INSTRUMENTS

#### a. Introduction

The worldwide proliferation of more than 2750<sup>1</sup> Bilateral Investment Treaties (BITs) over the last fifty years, on the one hand; as well as the coming into force of regional agreements such as the North American Free Trade Agreement (NAFTA) and multilateral treaties such as the Energy Charter Treaty (ECT),<sup>2</sup> on the other, have given life to the recent materialization of a new branch of law known as ‘International Investment Law’.<sup>3</sup>

One of the main characteristics of this branch of law is the introduction of private-law elements into the traditional notion of public international law. One of these new elements is the participation of private individuals within the traditional public international law sphere (i.e., formerly known as the law of nations<sup>4</sup>). This participation has been allowed by sovereign states through the incorporation of Bilateral Investment Treaty (BIT) provisions which relate to private rights of action in favour of private individuals. This action mainly provides private individuals with a mechanism to sue

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<sup>1</sup> UNCTAD, *World Investment Report 2010*, The International Investment Regime, on page 81.

<sup>2</sup> For more details see G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, Oxford University Press, UK 2007).

<sup>3</sup> Doak Bishop, J. Crawford, and W. Michael Reisman, *Foreign Investment Disputes – Cases, Materials and Commentary* (Kluwer Law International, The Netherlands, 2005), pages 1-17. See also S. P. Subedi, *International Investment Law – Reconciling Policy and Principles* (Hart Publishing, Oxford and Portland, Oregon, 2008), pages 7-18.

<sup>4</sup> Contemporary Public International Law has recognized, with distinct powers and purposes from the states, some international organizations as proper subjects of international law such as the United Nations, European Union, the Organization of American States, etc. See *Reparation for injuries suffered in the service of United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 174. Additionally, International law does not prohibit individuals from being recognized as subjects of international law. However, it will depend on the circumstances. Examples of these circumstances are the development and recognition of human rights and the humanitarian treatment of the victims of war in international law. See I. Brownlie, *Principles of Public International Law* (Seventh Edition, Oxford University Press, Oxford 2008), chapter 25.

sovereign states before international *ad hoc* tribunals for the domestic adoption of a determined regulatory conduct, such as unilateral administrative acts as the sovereign state's conduct that has violated a BIT provision.

This particular mechanism<sup>5</sup>, used to settle legal disputes between a state and private individuals, has been better known as 'investor-state treaty arbitration' or 'investment treaty arbitration'.<sup>6</sup>

The selection of ISTA for this research surrenders to the idea that this particular mechanism which is entrusted mainly with resolving regulatory disputes and the current arbitral practice has created worldwide concerns (see Chapter VI) which exist both at national and international levels.<sup>7</sup> The two main concerns have been: (i) investment arbitrators judging public-law and policy matters through the use of this arbitral mechanism; and (ii) the application of the principle of private law known as the principle of the party autonomy to various BIT disputes. This latter concern seems to be frequently used in the ISTA system by many litigants, without sufficiently taking due care of some elemental aspects of public (international and national) law, such as the public law capacity and nature of the respective sovereign contracting states and their international agreements such as BITs.

Perhaps the frequent use of this principle of private law (i.e., party autonomy) surrenders to the idea that the foundations of BITs are derived from the international argument which asserts that public international law is also imbued as having 'a

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<sup>5</sup> Apart from investor/state treaty arbitration, which is used to resolve disputes between a state and private individuals, there is also the mechanism which is used to resolve possible disputes between the contracting parties (i.e., state/state treaty arbitration). Nonetheless, the present study focuses mainly on the public law nature of BITs and investor-state treaty arbitration.

<sup>6</sup> See Doak Bishop, Crawford and Michael Reisman, *supra* note 3, pages 9-10.

<sup>7</sup> See, e.g., S. Montt, *State Liability in Investment Treaty Arbitration – Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, Oxford and Portland, Oregon, 2009); See also Van Harten, *supra* note 2; and M. Sornarajah, *The International Law of Foreign Investment* (Second Edition, Cambridge University Press, UK 2004).

contractual nature’.<sup>8</sup> The legal nature of public international law has also been referred to as ‘a contractual system’<sup>9</sup> which mainly highlights the legal conditions of sovereign contracting states such as equality and independence.<sup>10</sup>

In accordance with these premises, within the international investment law sphere, there is a tendency to consider BITs as special contractual agreements between two sovereign states which are also completely isolated from the application of public law precepts in general. In fact, the main argument is that these BITs should be considered as a *lex specialis* which should leave aside the application of those rules that govern general matters (*lex generalis*).<sup>11</sup>

With reference to the latter argument and also considering the above-mentioned elements of equality and independence of the contractual system, the question arises as to whether the contractual nature of BITs (in particular, BITs obligations) is truly and completely isolated from the application of institutions and principles of law in general, including those belonging to domestic (administrative) law.

It is also relevant to highlight here that the effect of domestic (administrative) law, as a branch of public law that regulates a state’s behaviour domestically, can be the cause of some international conflicts between principles of international law and principles of municipal law when an international regulatory dispute is at stake. Consequently, these conflicts could also compromise the state’s international responsibility for the adoption of regulatory actions at the local level. In particular, if one considers the fact that a state

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<sup>8</sup> G. Lysen, State Responsibility and International Liability of States for Lawful Acts – A Discussion of Principles (Iustus Forlaf Juridiska Foreningen I Uppsala, Sweden 1997), on page 177.

<sup>9</sup> Ibid., on page 28.

<sup>10</sup> Ibid., on page 28.

<sup>11</sup> O. M. Garibaldi, *Presentation on Investment Treaties and National Laws*, Seminar on Dispute Resolution in the International Oil & Gas Business – plus a special session on Boundary Disputes in the Energy Sector (organized by ICDR and AIPN), 19-21 April 2010, Houston, Texas.

is subject to public (international and national) law; it must act in accordance with the *principle of legality* at both a national and international level.

This observation encourages study and analysis of the legal nature of international investment treaties (BITs) and their obligations as part of the fabric belonging to the above-mentioned contractual system, but to be mainly viewed in conjunction with the principles of public international law and some principles of domestic law. One can therefore ask where these BITs are to be found within a given state's legal system. Can these BITs be considered to be a public law instrument? What kind of public law instrument are they? And, whether they have similar public law effects and consequences between the treaty-based state/state relationship and treaty-based state/investor relationship?

Taking these various questions into consideration, it is important to stress that the final aim of this exercise will be to reach a conclusion on the legal nature of these international investment treaties. This will then help to determine the legal nature of the above-mentioned mechanism of settling disputes, i.e., the state/investor arbitration (which is the main aim of Chapter IV).

The various assessments which have been carried out concerning the legal nature of BITs have been mainly done in the context of international law, until now. This is due to the fact that international law is considered to be of a 'sui generis' nature.<sup>12,13</sup> Thus, this has been regarded to belong to an autonomous branch of law. This concept has been viewed as a mechanism to discard *a priori* lessons that could be learned from

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<sup>12</sup> C. B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction* 41 Vand. J. Transnat'l L. 1083 (2008), on page 1086. For multiple definitions and approaches to international law see A. M. Slaughter, and S. R. Ratner, *Appraising The Methods of International Law: A prospectus for Readers* 36 Stud. Transnat'l Legal Pol'y 1 (2004).

<sup>13</sup> The term 'sui generis' is defined as 'of its own kind. Unique; in a class by itself'. S. H. Gifis, *Law Dictionary* (Barron's Legal Studies, USA 1996), on page 495.

many domestic legal systems around the world as it has been argued, for example, that ‘the lessons of many legal systems around the world were simply not thought to be applicable to international law’<sup>14</sup> and ‘there is little to be gained from national legal systems’.<sup>15</sup>

Distinguished from this, the opposing idea is to visualize international law as ‘a unified system of rules created deliberately and explicitly by states’<sup>16</sup> (i.e., the main subjects of public international law). This idea leads to the consideration of some domestic public law principles, e.g., principles from juridical, administrative and legislative areas; and their potential influence on the treaty-based state/investor relationship i.e., international regulatory disputes. Perhaps this can be done by referring to certain principles of domestic administrative law that have been conceived to deal with this type of relationship between a state and private individuals at the national level. Particularly, the conceptual and practical connections between the dynamic nature of international law and domestic law with regard to this state/investor relationship should be looked at in more detail.<sup>17</sup> In this regard, public law litigants may argue that precedents would help to improve and enrich the international investment arbitration system at issue, which is currently undergoing a crisis of legitimacy.

With regard to the main aim of this chapter, it is necessary to emphasize that the above-mentioned concerns, in addition to the legal basis of this new branch of law and its system of investment treaty arbitration, can be mainly found – *prima facie* – in the

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<sup>14</sup> W. E. Butler, *International Law and the Comparative Method*, in *International Law in Comparative Perspective* 25, 28 (William E. Butler ed., 1980); quoted by Picker, *supra* note 12, on page 1085.

<sup>15</sup> *Ibid.*, on page 1083.

<sup>16</sup> See A. M. Slaughter, and S. R. Ratner, *The Method is the Message* 36 *Stud. Transnat'l Legal Pol'y* 239 (2004), on page 239.

<sup>17</sup> See Slaughter and Ratner, *supra* note 12, on page 18.

classical sources of public international law, e.g., treaties, international custom and general principals of law.<sup>18</sup>

In this respect, the present chapter will study the legal nature of BITs, their effects, and their main provisions, and it will do so in terms of the main principles of international public law and from the perspective of some principles of domestic (administrative) law. Thus, it serves to illustrate international investment treaties as a ‘public system’ and as a better way of constructing law.<sup>19</sup> As a final cautionary preliminary remark, the author considers it his remit to warn the reader that due to the size of this research, some points within this chapter might be considered over-generalized.

### **b. Sources of public international law**

As previously mentioned, the *sui generis* nature of public international law<sup>20</sup> and the lack of a centralised legislative authority at the international level has resulted in the necessity of distinguishing, from a theoretical viewpoint, between formal and material sources of public international law.<sup>21</sup>

Due to the lack of a central legislative body, i.e., a kind of ‘international constitutional law making machinery’, it has been said that ‘formal sources [of law] do not exist in a sense in international law’.<sup>22</sup> Therefore, despite the difficulty of maintaining the distinction between these two sources of law,<sup>23</sup> the doctrine has consequently had to

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<sup>18</sup> Article 38 of the Statute of the International Court of Justice. Available at: <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>> (Last visit 21/11/2009).

<sup>19</sup> See Sornarajah, *supra* note 7, on page 158.

<sup>20</sup> See *supra* note 13.

<sup>21</sup> For multiple definitions and approaches to international law see also Slaughter and Ratner, *supra* note 12. See also A. Jaffe Carbonell, *Derecho Internacional Publico* (Academia de Ciencias Politicas y Sociales, Serie Estudios 70, Venezuela 2008), on page 48; Sornarajah, *supra* note 7, on page 34; I. Brownlie, *Principles of Public International Law* (Seventh Edition, Oxford University Press, Oxford 2008), on page 3; and Picker, *supra* note 12, on page 1086.

<sup>22</sup> See Brownlie, *supra* note 21, on page 3.

<sup>23</sup> *Ibid.*, on page 3.

rely on the figure of material sources of law which can be understood as ‘the existence of rules, which, *when proved*, have the status of legally binding rules of general application’.<sup>24</sup> (Emphasis added).

In this regard, in support of this latter idea, there are international instruments or principles that have been created and conceived to be material sources of public international law in accordance with the consent of sovereign states and customary law belonging to the already mentioned ‘contractual system’.<sup>25</sup> The majority of these principles have been codified and complied with, and are now embodied in international instruments in order to make them *prima facie* applicable (mainly) to the contracting parties, i.e., the sovereign states.<sup>26</sup>

An example *per excellence* of these material sources can be found in the Statute of the International Court of Justice, more specifically in Article 38.<sup>27</sup> This article has been commonly accepted as the main foundation that establishes the principal sources of public international law.<sup>28</sup> To this extent, Article 38 states:

- ‘1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - (a) *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
  - (b) *international custom*, as evidence of a general practice accepted as law;
  - (c) the *general principles of law* recognized by civilized nations;

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<sup>24</sup> Ibid., on page 3.

<sup>25</sup> Ibid., on page 3.

<sup>26</sup> V. J. Tejera Perez, *Investment Arbitration Within the Legal Promotion and Protection Framework in Venezuela*, Transnational Dispute Management Vol. 5, Issue 2 (2008), on page 849. See also Brownlie, *supra* note 21, on page 13.

<sup>27</sup> Statute of the International Court of Justice. Available at: <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>> (Last visit 21/11/2009).

<sup>28</sup> See Brownlie, *supra* note 21, on page 5.



- (d) subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination for the rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.’ (Emphasis added).

Based on content of this Article 38, it can be assumed that material sources of public international law may mostly be divided into three sources, namely: (i) international custom, (ii) general principles of law, and (iii) treaties. The present enumeration does not follow the hierarchical order established in the above-mentioned article. Conversely, this order has been adopted to give a better understanding and explanation of these important sources but within the context of this research.

The first source is found in international custom, which plays a central role in public international law. International custom has been said to constitute the *opinio juris* of the international community.<sup>29</sup> It can be understood ‘as evidence of a general practice accepted as law’, which also implies ‘a general recognition among States of a certain practice as obligatory’.<sup>30</sup> In other words, it can be assumed that international custom is unwritten law, which exists and has mandatory force, even though it is not enacted in a specific text.<sup>31</sup> Similarly, it has been said that prior to the application of any principle of international custom (to any state or even before the acquisition of the said mandatory force), it must be expressly accepted by the states involved through their consent.<sup>32</sup>

Secondly, there are the general principles of law. They are those principles that have been inspired by domestic law, i.e., principles developed domestically and accepted by

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<sup>29</sup> See Sornarajah, *supra* note 7, on page 89.

<sup>30</sup> J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, (Sixth Edition, 1963); quoted by Brownlie, *supra* note 21, on page 6.

<sup>31</sup> See Jaffe Carbonell, *supra* note 21, on page 47.

<sup>32</sup> See J. Vélez García, *Los Dos Sistemas del Derecho Administrativo – Ensayo de Derecho Publico Comparado* (Institución Universitaria Sergio Arboleda, Colombia 1994), on page 330; and Jaffe Carbonell, *supra* note 21, on page 237.

all (civilized) states.<sup>33</sup> In this case, it has been said that ‘[t]he intention [of this practice] is to authorize the Court to apply the general principles of municipal jurisprudence, in so far as they are applicable to relations of States’.<sup>34</sup> Additionally, it is believed that the general principles of law are a set of rules without which a legal system cannot function or even exist.<sup>35</sup> In other words, they constitute a necessity in any legal system since they help to cover the inevitable *lacunas* that may exist in public international law.

Lastly, there are the international conventions, better known as treaties. These legal instruments are defined by article 2(1)(a) of the Vienna Convention<sup>36</sup> as ‘international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.<sup>37</sup>

Emphasis must be put on the fact that treaties (in particular BITs) are created at the cost of restrictions on the contracting state’s immunity from jurisdiction, which are agreed upon and contained in provisions of the treaty itself.<sup>38</sup> Treaties are binding by virtue of the will of states to be bound through a public document. Their provisions are mainly interpreted in accordance with the principles of the Vienna Convention. These treaties may also adopt interchangeable nomenclatures such ‘convention’, ‘agreement’ or ‘protocol’.<sup>39</sup>

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<sup>33</sup> This term is understood as ‘a society or country that has a well developed system of government, culture and way of life and that treats the people who live there fairly’. See Cambridge Advanced Learner's Dictionary, <[http://dictionary.cambridge.org/dictionary/british/civilized\\_1](http://dictionary.cambridge.org/dictionary/british/civilized_1)> (Last visit 26/08/2010). See also Jaffe Carbonell, *supra* note 21, on page 100; and Lysen, *supra* note 8.

<sup>34</sup> See Oppenheimer v. Cattermole [1973] Ch. 264; Quoted by Brownlie, *supra* note 21, on pages 16 and 405.

<sup>35</sup> See Jaffe Carbonell, *supra* note 21, on page 92.

<sup>36</sup> The Convention entered into force on 27 January 1980 and no less than 105 states have become parties to it. See Brownlie, *supra* note 21, on page 607.

<sup>37</sup> Quoted by Brownlie, *supra* note 21, on page 609.

<sup>38</sup> See F. G. Jacobs, and S. Roberts, The effect of Treaties in Domestic Law (United Kingdom National Committee of Comparative Law, Sweet & Maxwell, London 1987), on page 58

<sup>39</sup> For further details on the coexistence of treaties with other sources of international law see M. E. Villiger, Customary International Law and Treaties – A Manual on the Theory and Practice of the Interrelation of Sources (Second Edition, Kluwer Law International, The Hague, London, Boston, 1997); P. Reuter,

Nevertheless, in the context of this research, it is also necessary to highlight the existence of the doctrinal distinction between law-making treaties (*traités-loi/vereinbarung*) and contractual treaties (*traités-contract/vertrag*). It has been also pointed out that ‘this distinction refers to the substance, not the form of treaties’.<sup>40</sup>

In relation to this distinction, it has been stated that law-making treaties ‘create general norms for the future conduct of the parties in terms of legal propositions, and the obligations [that] are basically the same for all parties’,<sup>41</sup> whereas contractual treaties involve ‘political bilateral bargains’ whose main purpose is to attend specific needs between contracting states (mainly, issues of public interest).<sup>42</sup>

It must be emphasised that IITs fall under the latter category of treaties. It has also been stated that one of the main obligations or commitments of the states is to internationally regulate their behaviour in order to guarantee that they neither overstep certain limits of law nor put others in danger.<sup>43</sup> That is to say, it covers the obligations to avoid or minimize the abuse of power or *ultra vires* on the part of any of the contracting parties which may be detrimental to the interests of the other contracting state or its nationals.

Here it is important to draw attention to the fact that this latter point seems to be similar to the domestic legal position of the state to regulate domestic state/individual relationships. Hence, it is important to stress that this latter domestic relationship is mostly governed by principles of domestic (administrative) law.

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Introduction to Law of Treaties (Kegal Paul International, London and New York, 1995); I. Sinclair, The Vienna Convention on the Law of Treaties (Second Edition, Manchester University Press, UK 1984).

<sup>40</sup> See Reuter, *supra* note 39, on page 26.

<sup>41</sup> See Brownlie, *supra* note 21, on page 13; and Picker, *supra* note 12, on page 1110.

<sup>42</sup> See Brownlie, *supra* note 21, on page 13; and Picker, *supra* note 12, on page 1111.

<sup>43</sup> See Vélez García, *supra* note 32, on page 330; and Jaffe Carbonell, *supra* note 21, on page 237.

i. Treaty-Contracts as *lex specialis* and the state's international responsibility

Despite the argument about the neither clear nor correct division of treaties between treaty-law and treaty-contract; an additional element regarding the distinction can be found. This element is the argument of considering some international treaties, such as BITs, as contracts<sup>44</sup> (i.e., *lex specialis*).<sup>45</sup> This element of distinction gives rise to the notion of contractual responsibility of the state at the international level when there has been an infringement of a BIT provision.

In this context, it has been argued that, on the one hand, (i) contracts are conceived to regulate the relationship between parties,<sup>46</sup> and, on the other hand, (ii) that the law of treaties and international responsibility have been used for different purposes other than regulating the traditional relationship between two subjects of the same legal nature (public law) and of the same legal status at an international level, such as sovereign contracting states.<sup>47</sup>

With regard to the proposition concerning the private law characteristics of the BITs, it is noteworthy that some interesting legal elements can be found in general contract theory<sup>48</sup> and the law of obligations.<sup>49</sup> Under both theory and law, it has been recognised

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<sup>44</sup> A contract is understood to be 'an agreement between two or more individuals to constitute; rule; transmit; modify, or extinguish between them a legal nexus'. (Translated into English by the author). Article 1.133, Venezuelan Civil Code.

<sup>45</sup> See Reuter, *supra* note 39, on page 27; and Lysen, *supra* note 8, on page 128.

<sup>46</sup> Article 1.159 of the Venezuelan civil code establishes that 'the contract has a force of law between the parties which cannot be revoked except by the mutual consent of the parties or by causes authorised by law'. (Translated into English by the Author).

<sup>47</sup> See Lysen, *supra* note 8, on pages 101 and 133.

<sup>48</sup> See S. Wheeler, and J. Shaw, *Contract Law – Cases, Materials and Commentary* (Clarendon Press – Oxford, 1994), pages 30-118. See also J. Melich-Orsini, *Doctrina General del Contrato* (2° Edición, Editorial Jurídica Venezolana, Caracas 1993) and N. Cohen, and E. McKendrick., *Comparative Remedies for Breach of Contract* (Hart Publishing, Oxford and Portland, Oregon, 2005).

<sup>49</sup> See Wheeler and Shaw, *supra* note 48, pages 3-29.

that the violation of any contractual commitment involves an obligation to compensate the aggrieved party.<sup>50</sup>

This domestic private law principle on contractual responsibility was exported into the international arena through the case of the Chorzow Factory, which has also been used as ‘the anchor upon which the responsibility of a state arising out of breach of a treaty – any breach – rests’.<sup>51</sup>

It has also been said that ‘the implementation of that responsibility is a matter for the law of responsibility of States, not for the law of international treaties’.<sup>52</sup> To put it another way, the responsibility of a state in breach of a treaty obligation seems to be activated as a consequence of the breach as though it were a breach of a private law contract.

Regarding this latter aspect, it is crucial to point out here that the notion of a state’s contractual responsibility is not only based on public international law but is also based, in some circumstances, on principles of public domestic law. This is due to the fact that, domestic public law is the law that gives meaning to the act of state that is considered wrongful at the international level. (See chapter IV and V).

For this reason, the legal nature of BITs as treaty-contracts may be required to be revisited within this research from the perspective of some principles of (international and national) public law due to the fact that the argued international unlawful, arbitrary or discriminatory conduct of a host state is mainly based on the breach of specific BIT

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<sup>50</sup> Ibid.

<sup>51</sup> Quoted by S. Rosenne, *Breach of Treaty* (Grotius Publications Limited, Cambridge 1985), on page 47. See also Sornarajah, *supra* note 7, pages 93-95; and I. Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 380.

<sup>52</sup> Rosenne, *supra* note 51, on page 47.

commitments by one of the contracting parties. Towards the end, this revision will also include the damage to private individuals as one of the motives which activates the responsibility of the state at the international level. This international responsibility will consequently give rise to the obligation to compensate the aggrieved party, largely in accordance with principles of public international law.<sup>53</sup>

Conclusively, taking into account that (i) the contracting parties in a given treaty are sovereign states (i.e., main subjects of public international law);<sup>54</sup> (ii) the necessity of having the contracting states express consent to create reciprocal commitments through the said treaty (i.e., full powers to negotiate, sign and seal an IIT and the creation of contractual rights and obligations);<sup>55</sup> (iii) the activation of a state's liability for the breach of the treaty provisions (i.e., law of responsibility of states); and (iv) the subsequent compensation for the aggrieved individual for the breach of such treaty provisions; a contractual and sovereign relationship clearly exists between two subjects of public international law.

### **c. International investment treaties as public law instruments (treaty-contracts)**

Coming back to the idea that International Investment Treaties (IITs) can be considered to be treaty-contracts,<sup>56</sup> as previously mentioned, the question arises as to the legal nature of this kind of agreement, but this time within the scope of, and in consideration of, the main principles of public international law (particularly with reference to the provisions of the Vienna Convention).

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<sup>53</sup> For more details see Lysen, *supra* note 8.

<sup>54</sup> See Sornarajah, *supra* note 7, on page 34.

<sup>55</sup> In this regard, it has been said that 'in the case of agreements between governments, full powers, in the sense of the formal documents evidencing these and their reciprocal examinations by the negotiators, are often dispensed with' and that 'A state is bound irrespective of international limitations by consent given by an agent properly authorized according to international law'. See Brownlie, *supra* note 21, on pages 617 and 610.

<sup>56</sup> See *supra* note 44.

Thus, reaching a conclusion on the legal nature of BITs will help to determine the legal nature of ISTAs (the objective of Chapter IV). Subsequently, based on the final conclusion regarding the legal nature of ISTAs, the possibility of whether or not some principles of domestic administrative law (mentioned in Chapter II) can be used as references in order to resolve issues arising from regulatory disputes which are settled by means of the above-mentioned ISTA (the objective of Chapter V) will be addressed.<sup>57</sup>

The principal argument for taking this approach is based on the idea that one should begin the present legal analysis by taking the public law nature of the host state's regulatory conduct into account. Thereafter, one should analyze whether this regulatory conduct has or has not affected the interests of a given investor or a group of investors. In some cases, if a regulatory conduct has an effect on the interests of investors this may or may not represent a breach of an IIT's provisions.<sup>58</sup>

In particular, this query is contextualized in the fact that the law which controls the host state's regulatory conduct and the development of foreign investments is not only public international law, but also public domestic law. In this regard, it has been argued that this domestic/international law synergy is in a state of constant expansion due to the fact that some states (especially developing countries) hold the belief that the current investment scheme of IITs may help to harness their economy and aid their

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<sup>57</sup> In this regard, Professor T. Wälde stated 'The common principles of the main administrative law systems are in my view an important point of reference for the interpretation of investment treaties to the extent investment treaty jurisprudence is not as yet firmly established'. See *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion.

<sup>58</sup> It has been stated that 'A state may breach a treaty without breaching a contract, and vice versa'. See *Azurix Corp. v. la Republica Argentina* (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award.

development.<sup>59</sup> Taking these facts into consideration, it is important to lay out the following issues:

i. Definition of BITs

As a starting point the definition and nature of BITs must be visited. The official definition of a treaty is contained in article 2(1)(a) of the Vienna Convention.

The Vienna Convention establishes that a treaty can be understood as:

*[A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.* (Emphasis added).

Similarly, an additional definition of a treaty was quoted by Prof. I. Brownlie in his book entitled 'Principles of Public of International Law'. He cited the 1962 provisional draft of the International Law Commission that defined a treaty as:

*[A]ny international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordant, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.*<sup>60</sup> (Emphasis added).

The previous two definitions of treaty draw attention to five common elements: they are: (i) an international agreement, (ii) in written form, (iii) concluded between two or more states, (iv) embodied in one single or more instruments, and (v) governed by international law. These five common elements also make up the most essential

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<sup>59</sup> For developing states, the right of regulation lies at the root of foreign investment policy. See Sornarajah, *supra* note 7, on pages 101, 105 and 313.

<sup>60</sup> Yrbk. ILC (1962), ii 161; quoted by Brownlie, *supra* note 21, on page 608. See also Reuter, *supra* note 39, on page 30 who defines a treaty as 'an expression of concurring wills attributable to two or more subjects of international law which has legal effects under the rules of international law'.



elements for the existence of civil law contracts, i.e., consent, subject-matter, and licit cause.<sup>61</sup>

Regarding the definition of a BIT, it is important to include within the traditional definition of a treaty an additional component to the common elements. This additional element is the mutual and express promise of the contracting parties to materialize their reciprocal intentions of promoting economic cooperation to their reciprocal benefit.<sup>62</sup> In other words, the additional element is the express introduction of aspects of a state's public interest within such state-state cooperation. This is a common factor in the subject-matter of all BITs.

Despite the fact that it has been said that 'jurists are today less willing to accept the more doctrinal versions of the distinction between treaty-contract (*vertrag*) and treaty-law (*vereinbarung*)',<sup>63</sup> from the author's point of view, a BIT can be defined as a contractual agreement (a treaty-contract) in written form between two sovereign states embodied in a single agreement through which they establish reciprocal obligations in order to promote economic cooperation to their reciprocal benefit.<sup>64</sup> This kind of international agreement is known within international investment law argot as a '*lex specialis*'.<sup>65</sup> That is to say, it has the character of a binding and regulatory document between the sovereign contracting states.<sup>66</sup>

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<sup>61</sup> Article 1141 of the Venezuelan Civil Code.

<sup>62</sup> See, e.g., the preamble of the Venezuela-Vietnam BIT; the Venezuela-Belarus BIT; the Venezuela-Barbados BIT; the USA-Argentina BIT; the USA-Ecuador BIT; the USA-Panama BIT; the Colombia-Peru BIT; the Colombia-Switzerland BIT; the Colombia-UK BIT; the Colombia-Spain BIT; the Colombia-Chile BIT; and the Colombia-Cuba BIT.

<sup>63</sup> See Brownlie, *supra* note 21, on page 637.

<sup>64</sup> For an extensive explanation of the state's role as a primary subject of international law; See Cassese, A., *International Law* (Oxford University Press, UK 2001), on pages 71-150; and Brownlie, *supra* note 21, pages 57-102.

<sup>65</sup> See Sornarajah, *supra* note 7, on page 206

<sup>66</sup> See Lysen, *supra* note 8, on page 101.

This contractual state-state relationship is governed *prima facie* by the private law principle of *pacta sunt servanda* (agreements must be kept). It means that the performance of a given BIT must be conducted in accordance with certain standards, i.e., mutual obligations (see sub-section d) that have been previously agreed upon between the parties located in the BIT. As previously mentioned, the possible breach of these standards (i.e., obligations or duties) involves the responsibility on the part of the wrongdoing contracting state.<sup>67</sup> These international standards should mainly be interpreted in accordance with the provisions of the Vienna Convention. Nevertheless, it has been said that a breach of an investment contract does not necessarily involve a breach of a treaty or vice versa.<sup>68</sup>

## ii. Legal nature of BITs

When determining the legal nature of BITs, it is necessary to assert that when the notion of a contractual agreement is mentioned here, the traditional and classical theory of contract and the law of obligations is immediately referred to.<sup>69</sup> Such a reference is mainly based on the contractual nature of BITs as a voluntary agreement.<sup>70</sup>

Nonetheless, it raises the question about allocating these BITs within the traditional branches of law<sup>71</sup> (e.g., private and public law).

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<sup>67</sup> For a detailed study on state responsibility and international liability of states, see Lysen, *supra* note 8.

<sup>68</sup> In this regard, it has been stated 'that a breach of a contract which the state has made with a foreign investor does not by itself give rise to an international remedy'. See Sornarajah, *supra* note 7, on page 13; G. S. Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, in A. J. Van den Berg, *International Arbitration 2006: Back to Basics – ICCA International Arbitration Congress* (Kluwer Law International, Netherlands 2007); and Montt, *supra* note 7, on page 338.

<sup>69</sup> In this regard, it has been said that 'conventions, treaties and other international agreements *are essentially contracts between states*. Regardless of the substance of such agreements, which may be particular to the special relationships and circumstances between states, what is relevant here is how the agreements are interpreted and applied. International treaty interpretation is not all that unique; it tends to reflect domestic legislative and contract interpretation methodologies.' (Emphasis added). See Picker, *supra* note 12, on page 1092.

<sup>70</sup> See Wheeler and Shaw, *supra* note 48, on page 25.

<sup>71</sup> See for more details Melich-Orsini, *supra* note 48, on pages 35-60; and A. Watson, *Roman Law and Comparative Law* (The University of Georgia Press, Athens and London 1991), pages 53-68.

Before moving forward, it is also necessary to focus on the fact that even though this research is limited in space precluding the possibility of expanding upon the wide range of types of contracts, the author, in order to simplify the discussion, will limit this research to the distinction between private contracts (i.e., private law contracts)<sup>72</sup> and public contracts (i.e., public law contracts<sup>73</sup>). There is a paucity of literature on the application of contract theory to treaty dispositions.

In relation to this point, it has been stated that ‘courts and commentators have not explored the application of contract theory to treaty interpretation in great depth’.<sup>74</sup> However, it is not the intention of this research to fill this gap in the literature. On the contrary, the purpose is to provide the reader with a general idea on such a point.

Now, as far as this research is concerned, and being conscious of the fact that the meaning of most terms used in the wording of a treaty text can be variable, in addition to the change in country and constitution; it is of the utmost importance to point out that the form and content of a BIT tacitly refer to the legal requisites and elements of a private law contract, e.g., consent, subject-matter and licit cause.<sup>75</sup> One example of the applicability of these private law elements to the investment arbitration system can be found in *Desert v. Yemen* (2008) where the arbitral tribunal made express reference to one of the factors which negates consent, i.e., duress. In this regard, the arbitral tribunal

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<sup>72</sup> These types of contracts are agreements which are concluded by subjects of private law and are mainly governed by principles of private law, including contracts which are concluded by the state in its private capacity.

<sup>73</sup> These types of contracts are agreements which are concluded between two or more subjects of public law, acting in its/their public capacity and are governed not only by principles of private law, but also by principles of public law. These types of contracts, unlike private contracts, involve issues of public interest. See Chapter II, b) iv).

<sup>74</sup> See Tejera Perez, *supra* note 26, on page 854.

<sup>75</sup> For example, this distinction between private and public contracts seems to belong more to the civil law tradition in which the doctrine of public contracts has been pioneered by the French administrative legal system; whereas the common law tradition has been pioneered by the British administrative legal system, despite the constant influence from the EU, which seems to follow the Diceyan reluctance to this unconvincing division between private and public contracts. For critiques and an explanation on the topic under the British System see A. C. L. Davies, *The Public Law of Government Contracts* (Oxford University Press, UK 2008), pages 72-83; Picker, *supra* note 12, on page 1098; and, Reuter, *supra* note 39, on page 29.

concluded that the subscription to ‘the settlement agreement was signed under duress’.<sup>76</sup>

At first glance, public contracts do not differ significantly from the form and content of private contracts. However, the essential elements that make private law contracts distinguishable from public law contracts are largely connected to (i) the subject-matter of the public law contract, i.e., presence of the state’s public interest (social order)<sup>77</sup> and (ii) the public law capacity of one or both contracting parties<sup>78</sup> (i.e., the acquisition of the legal capacity in accordance with the principle of legality).<sup>79</sup>

For example, if a state is acting in its private law capacity then there will be no doubt of the mainly commercial or private law nature of such a contract.<sup>80</sup> Conversely, if a state is acting in its public law capacity, as it does when signing BITs, then there is a contract of a public law nature; and therefore, a contract relating to the public interest. That is to say, the public contract and its contents will be mainly subject to and governed by rules of public law.<sup>81</sup>

Another aspect regarding the distinction between private-law and public-law contracts is a point related to the application of the principle of *pacta sunt servanda* (agreements must be kept).<sup>82</sup> Here, it is important to state that in the case of BITs, the application of this principle is – in essence– based on the principle of legal equality among sovereign

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<sup>76</sup> See *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB/05/17) February 6, 2008 – Final Award, on paragraph 190.

<sup>77</sup> It has been said that ‘this idea of structuring social order around a contract has existed since Plato’. For more explanation on this point, see Wheeler and Shaw, *supra* note 48, pages 119-120; and Melich-Orsini, *supra* note 48, on page 59.

<sup>78</sup> See Chapter II, sub-section b.

<sup>79</sup> See Wheeler and Shaw, *supra* note 48, on page 120.

<sup>80</sup> See Van Harten, *supra* note 2, on page 128.

<sup>81</sup> A comparison of this type of public contract with other public contracts, such as state contracts, administrative or government contracts will be undertaken later (see Chapter II, sub-section b); see also point viii. Analogy with Domestic Administrative Law contained in this chapter).

<sup>82</sup> In this regard, it is argued that ‘pacta sunt servanda applies between state parties and not between the parties to a dispute’. See Van Harten, *supra* note 2, on page 131.

states.<sup>83</sup> This declaration has created a debate concerning the application of this principle to the double treaty-based relationship.

For example, there are two types of treaty-based relationships. The first of which is relationship between sovereign contracting states and, the second of which the relationship is between one of the sovereign contracting states and a national of the other sovereign contracting state.

Nonetheless, the public law nature of the BIT applies to both types of relationship. For the simple reason that the second type of relationship is a kind of secondary, subsidiary or indirect relationship between one sovereign contracting state (i.e., the host state) and a national of the other contracting state.<sup>84</sup> In law, in general, there is a well-known aphorism which asserts that ‘the accessory follows the principal’. That is to say, the participation of private individuals within the state-state relationship is more like an open invitation to enjoy the prerogatives of the BIT, i.e., it is akin to the legal effects of an ‘adhesion clause’.

The issue which has raised considerable debate is based on the fact that once a BIT is in force; it is argued that it is in force between the contracting parties, i.e., the sovereign states, and not between a contracting state and an investor.<sup>85</sup> In accepting this secondary relationship as a primary treaty-based relationship, it could then give grounds to the argument that such an application could be interpreted as though it were a freezing clause related to the host state’s discretionary and regulatory power to introduce new regulations on grounds of the public interest. In theory, it has been stated

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<sup>83</sup> See Lysen, *supra* note 8, on page 54.

<sup>84</sup> See Van Harten, *supra* note 2, on page 130.

<sup>85</sup> *Ibid.*, on pages 120 and 130.

that, ‘the idea that a contract made by a state is defeasible in the public interest in demonstrably common to all legal systems’.<sup>86</sup>

Additionally, as already emphasized, it has also been argued that if the state and individual relationship was treated as a primary based treaty relationship, one would argue that there is an elevation of an investor’s legal status to the rank of a state.<sup>87</sup> The consequence of this elevation is that it could be beyond the scope of the traditional public international law notion and the possibility for an individual to bring a claim directly against the state.<sup>88</sup>

Furthermore, it can be affirmed that such a legal equalization was not part of the primary intention of the contracting parties. In this regard, BITs are exclusively concluded by the main subjects of public law, i.e., sovereign states in the exercise of their sovereign powers. These sovereign powers are subject to the rules of public (international and domestic) law and their main objective is to promote economic cooperation to their reciprocal benefit, based on their public interest. In such a case, it can also be affirmed that the public interest could therefore be protected by the international principle *rebus sic stantibus* (things thus standing).<sup>89,90</sup>

For this reason, a BIT is a public instrument but with double public law effects. That is to say, it has *a contractual effect* between the contracting states, and it has *a regulatory effect* between the host state and the nationals of the other contracting party. (See *infra* sub-section c) viii. Analogy with some principles of domestic administrative law).

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<sup>86</sup> See Somarajah, *supra* note 7, on page 422.

<sup>87</sup> See Van Harten, *supra* note 2, on page 130.

<sup>88</sup> See Doak Bishop, Crawford and Michael Reisman, *supra* note 3, on page 1.

<sup>89</sup> See Article 62 of the Vienna Convention.

<sup>90</sup> Obviously, if the approach taken were that the direct beneficiary of these kinds of agreements is the foreign investor, as *lex specialis*, who not only has the right to claim its rights, but to protect itself from the regulatory conduct of the host state, the above-mentioned principle of *rebus sic stantibus* cannot be invoked because of the state-investor relationship and this may actually be a misinterpretation of article 27 of the Vienna Convention.

Additionally, it can be said that BITs, as treaty-contracts, are public law instruments (in some cases assimilated to contracts of national interest<sup>91</sup>), that are enforceable due to the negotiation, intention and consent of the sovereign contracting states. This public nature is mainly based on: (i) the public nature of the parties (*ratione personae*) and (ii) the public nature of subject matter of the treaty (*ratione materiae*).<sup>92</sup>

Finally, as will be seen later, under current practice, a breach of a BIT's provisions makes the host state contracting parties subject primarily to the application of public international law principles as well as those standards that are contained in the treaty itself.<sup>93</sup> The question here will now be, to what extent this legal application of standards (in particular the application of the FET standard) is completely isolated from the application of some principles of domestic administrative law, including the notion of public interest, when international regulatory disputes are at stake.

### iii. Historical evolution of BITs

Before embarking on a general description of the historical evolution of IITs and their main foundations, it is necessary to go back in time to the fifteenth century when the treaties of Westphalia were signed. This event marked the formal emergence of an international agreement between states; including the emergence of bilateral treaties that were signed by the pairs of states concerned.<sup>94</sup> However, it could be suggested that

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<sup>91</sup> There is a debate concerning the specific meaning of this term. However, there is a trend to consider contracts of national interest as 'those agreements concluded by the state that can give rise to foreign claims'. See A. R. Brewer-Carias, *Contratos Administrativos* (Editorial Jurídica Venezolana, Caracas – Venezuela 1992), pages 31-34.

<sup>92</sup> See sub-section iv. Concept of Investment.

<sup>93</sup> See Sornarajah, *supra* note 7, on page 247.

<sup>94</sup> See Reuter, *supra* note 39, on page 2.

bilateral treaties can even go further back to when the pharaohs in Egypt wanted to protect their trading interests from merchants from other countries.<sup>95</sup>

Returning to the present, it could be said that, despite the fact that a long list of historical events that have determined the historical evolution of IITs is possible, along with a long list of international agreements that have been signed over the history between states,<sup>96</sup> those treaties of ‘friendship, commerce and navigation’ were signed from the seventeenth century onwards.<sup>97</sup> It has been said that the FCN treaties represented the starting point of the current bilateral investment treaty since they ‘may indicate a linkage between trade and investment’.<sup>98</sup> The content of these treaties ranged from aspects related to the treatment of aliens, to the freedom of worship and travel within the host state.<sup>99</sup>

Furthermore, it is also important to point out that it was during the middle of the nineteenth century when the Triepel theory on the distinction between treaty-law (*Vereinbarung*) and treaty-contract (*Vertrag*) emerged.<sup>100</sup> The main objective of this distinction referred to the substance of the treaties, and not to their form.<sup>101</sup>

The contemporary history of BITs as agreements of long duration<sup>102</sup> starts with the historical signing of the first Bilateral Investment Treaty that was concluded in 1959 by Germany and Pakistan<sup>103,104</sup> (it recently celebrated its 50 years anniversary).<sup>105</sup> Since

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<sup>95</sup> See Doak Bishop, Crawford and Michael Reisman, *supra* note 3, on page 2.

<sup>96</sup> See e.g., Subedi, *supra* note 3, pages 19-53.

<sup>97</sup> A treaty between France and the United States which was concluded in 1778 is reputed to be the first of such treaties. See further K. J. Vandervelde, *United States Investment Treaties: Policy and Practice* (1992); quoted by Sornarajah, *supra* note 7, on page 209.

<sup>98</sup> *Ibid.*, on page 208.

<sup>99</sup> *Ibid.*, on page 210.

<sup>100</sup> See Reuter, *supra* note 39, on page 26.

<sup>101</sup> *Ibid.*, on page 26.

<sup>102</sup> Usually a BIT lasts between 10 and 20 years. See Subedi, *supra* note 3, on page 84.

<sup>103</sup> Although, it has been argued that ‘the roots of modern rules on foreign investment can be traced back to 1778 when United States and France concluded their first commercial treaty’ (Emphasis added). See, e.g., R. Dolzer, and C. Schreuer, *Principles of International Investment Law* (First Edition, Oxford University Press,



then, there has been rapid growth in the number of BITs to over 2750. It has been argued that such an increase has been due to the lack of funds for economic development; recession in the developed economies; and the changes in policy.<sup>106</sup>

Perhaps the relevance and importance of mentioning these points is due to the fact that, even though there has been an increase in the number of BITs, a number of these have been various failed attempts to conclude multilateral agreements on investment, e.g., Multilateral Investment Agreement (MIA).<sup>107</sup> Similarly, it has been said that the signing of this kind of agreement ‘would significantly curtail [host states’] control over their domestic regulatory space’.<sup>108</sup>

Since the Second World War,<sup>109</sup> the political bargaining and legal ideology behind the signing of BITs has been perceived to be a practice which stabilizes those above-mentioned principles and elements related to investment, which are undertaken by corporations, as well as the freedom to establish within the host state’s territory.<sup>110</sup> It has been said that these principles and elements were created by international customs in order to contribute to the investment sector in the future.<sup>111</sup>

In fact, this practice has given rise to the concept of a *lex specialis* referring to the two-party-agreement mechanism to create a regulatory relationship between contracting

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UK 2008), on page 17. Here one must question whether it was a commercial or investment treaty, and whether one use the terms commercial and investment interchangeably.

<sup>104</sup> See Sornarajah, *supra* note 7, on page 105; Dolzer and Schreuer, *supra* note 103, on page 18; and A. Newcombe, and L. Paradell, Law and Practice of Investment Treaties – Standards of Treatment (Wolters Kluwer – Law & Business, Austin, Boston, Chicago, New York and The Netherlands, 2009), on page 42.

<sup>105</sup> See, e.g., 50 Years of Bilateral Investment Treaties Conference 2009, celebrated in Frankfurt, Germany, 1-3 December 2009. <<http://www.50yearsofbits.com/>> (Last visit 17/09/2010).

<sup>106</sup> See Sornarajah, *supra* note 7, on page 215.

<sup>107</sup> T. Clarke, and M. Barlow, MAI – The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty (Stoddart, Canada 1997).

<sup>108</sup> See R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. Int’l L. & Pol. 953 (2006), on page 969.

<sup>109</sup> See Newcombe and Paradell, *supra* note 104, on page 120.

<sup>110</sup> See Sornarajah, *supra* note 7, on page 41.

<sup>111</sup> *Ibid.*, on page 206.

states in order to minimize the uncertainty that has dominated international law, in particular with regard to the protection of foreign investment.<sup>112</sup>

In the 1960s, due to the yo-yo effect of state policies and the world economy, the United Nations, as a worldwide international organization, through the International Law Commission, adopted the 75-draft-article-document on the law of treaties, which later constituted the basis of the Vienna Convention on the Law of Treaties.<sup>113</sup> The main aspects of this Convention were: (i) the recognition of the existence of some principles of law; (ii) the limitation of this convention to treaties concluded by and between states; (iii) the limitation of the convention to 'material breach'; and (iv) the scope of limitation of the convention; which is to say, that it would not deal with: (a) treaties between states and organizations, or between two or more organizations; (b) questions of state succession; (c) the effect of war on treaties.<sup>114</sup>

Similarly, within the context of the treaty provisions, the Permanent Court of Justice through its decision in the *Chorzow Factory* case introduced the notion of international state responsibility, which was a result of a refusal by the state to fulfil a treaty obligation.<sup>115</sup>

This responsibility has been constructed with the concept of the diplomatic protection of citizens abroad in mind. This is due to the fact that the theory of state responsibility to aliens was based on the idea that 'injury to the alien is an injury to his home state'.<sup>116</sup>

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<sup>112</sup> Ibid, on page 206.

<sup>113</sup> See Brownlie, *supra* note 21, on page 607.

<sup>114</sup> See Sinclair, *supra* note 39, on page 6; and Rosenne, *supra* note 51, on page 8.

<sup>115</sup> I.C.J. Reports 1950, p. 221 at 228; quoted by Rosenne, *supra* note 51, on page 51.

<sup>116</sup> See Sornarajah, *supra* note 7, on page 138; and Brownlie, *supra* note 21, on pages 17 and 520.

This is why it has been said that ‘the root of international law on foreign investment lies in the effort to extend diplomatic protection to the assets of the alien’.<sup>117</sup>

In summary, the rapid increase in the number of BITs is mainly due to the advantage of signing this type of special *ad hoc* agreement between contracting parties and due to the failure of states to finalise multilateral agreements.<sup>118</sup> Additionally, it has been said that due to the far-reaching consensus of states on the standards of treatment towards aliens on the part of the host state, ‘a considerable tension’ has emerged between the developed and developing countries regarding the exercise of the host state’s regulatory conduct, the application of state responsibility and the need to promote and protect investments.<sup>119</sup>

#### iv. Main characteristics of BITs

The main characteristics of BITs can be principally divided into two categories: (i) essential characteristics, i.e., those without which the BITs would not exist; and (ii) characteristics of form (structure), which relate to those characteristics which do not necessarily determine the existence of a BIT and may vary from one document to another.<sup>120</sup>

Within essential characteristics, it is important to mention: (i) the contractual nature of the BIT, i.e., an agreement (e.g., a public law instrument); (ii) its form which must be in writing; (iii) the legal nature of the contracting parties which must be two sovereign states (i.e., subjects of public law with full powers to negotiate, sign and seal a BIT<sup>121</sup>);

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<sup>117</sup> See Sornarajah, *supra* note 7, on page 18.

<sup>118</sup> *Ibid.*, on page 212.

<sup>119</sup> *Ibid.*, on page 139.

<sup>120</sup> These characteristics are based on the requirements of the Vienna Convention, i.e., the mutual cooperation between the contracting parties.

<sup>121</sup> See *supra* note 54.

(iv) the formality that requires the BIT to be embodied in a single instrument; (v) the governing law that refers to international and national laws; (vi) the establishment of reciprocal obligations (standards of treatment); and (vii) the declaration of the main aim of the contracting parties, i.e., the promotion of their economic cooperation in terms of the reciprocal benefit to them, e.g., issues of public interest of the contracting states (as part of the BIT's subject matter).

The characteristics relating to form (structure)<sup>122</sup> can be summarised as: (i) the preamble that mainly states the aims of the BIT; (ii) the list of basic definitions as an identification of types of property to be protected, (including the 'controversial' definition of 'investment'<sup>123</sup> and the elements related to the nationality of foreign investors); (iii) the admission and protection of foreign investors; (iv) the description of the respective standards of treatment or rights (i.e., obligations) to be given to the contracting parties and their national investors, e.g., fair and equitable treatment of investors; repatriation of profits; compensation for damages, etc; (v) the mechanisms established to settle disputes between the contracting parties and between a contracting party and nationals of the other contracting party (including consultation and negotiation) and the applicable law and proceedings rules; and (vi) the dispositions related to the effectiveness, duration, extension, and termination of the BIT.<sup>124</sup>

#### v. Concept of foreign investment

One of the most important and sensitive characteristics to a BIT is the definition of 'foreign investment' or 'investment'. Nevertheless, this concept may vary from treaty

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<sup>122</sup> These characteristics of IITs are based on the common structure which IITs have, despite their different contracting parties.

<sup>123</sup> See sub-section c) v. Concept of Foreign Investment.

<sup>124</sup> See Sornarajah, *supra* note 7, on page 217; Subedi, *supra* note 3, on page 84; and C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press, UK, 2008), pages 28-34.

to treaty. It will depend on the intention and the bargaining power of the contracting states. However, this aspect is certainly defined and embodied in the majority of BITs.

For example, the USA-Argentina BIT (1994) defines ‘investment’ as follows:

[E]very kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value and directly related to an investment; (iv) intellectual property which includes, *inter alia*, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavour, industrial designs, semiconductor mask work, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade name; and (v) any right conferred by law or contract, and any licences and permits pursuant to law.

One of the problems with this type of definition is that it has been defined ‘as broadly as possible’.<sup>125</sup> Thus, it is not an easy task for investment arbitrators to determine the number and nature of investments that are involved under the scope of a given BIT.<sup>126</sup> Nonetheless, it is crucial to point out that one of the inevitable aspects of a definition of investment is the incorporation of long-term investment agreements, which have been simultaneously assimilated into the notion of investments of public interest, since they may impact or benefit the host state economy.<sup>127</sup>

<sup>125</sup> See Sornarajah, *supra* note 7, on page 220.

<sup>126</sup> See, e.g., *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award; *Salini Costruttori, S.P.A. et al v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) July 23, 2001 – Decision on Jurisdiction. 42 ILM 609 (2003); and *Joy Mining Machinery Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/03/11) August 6, 2004 – Award on Jurisdiction.

<sup>127</sup> See Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009 <[http://www.thedti.gov.za/ads/bi-lateral\\_policy.pdf](http://www.thedti.gov.za/ads/bi-lateral_policy.pdf)> (Last visit 03/10/2009).

This incorporation has been mainly due to the contribution that this type of long-term investment contract has to the host state's development and, consequently, to the coexistence of this type of agreement with a host state's public interest.<sup>128</sup> This clarification is given due to the fact that public investments are slightly different from those short-term private or commercial agreements, which are typically identified with the trading of goods and services.<sup>129</sup> In this regard, it is opportune to point out the *Salini test* which mainly highlights the four main elements required by a foreign investment to be considered as an investment for purposes of the ICSID Convention: they are (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State's development.<sup>130</sup>

Another of the most common characteristics related to the definition of investment is found in the preamble of these BITs. This characteristic essentially refers to the real intention of the contracting parties. That is to say, the preamble consolidates, in one way or another, the acknowledgment of a common public interest in the contracting parties, based on the belief that, through the promotion and protection of investments, BITs also generate a synergy which stimulates economic initiative and increases the welfare and prosperity of both states involved.<sup>131</sup>

Within this context, a foreign investment has been defined as

[The transference] of tangible or intangible assets from one country into another for the purpose of their use in that country *to generate wealth under the*

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<sup>128</sup> See *the Salini Test* in *Salini Costruttori, S.P.A. et al v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) July 16, 2001 – Decision on Jurisdiction. 42 ILM 609 (2003). See also *Joy Mining Machinery Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/03/11) August 6, 2004 – Award on Jurisdiction and *Salini Costruttori, S.P.A. et al v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13) January 31, 2006 – Final Award.

<sup>129</sup> It is important to highlight that just because the short-term nature of these agreements is mentioned; it does not mean that long-term private investment or commercial agreements do not exist.

<sup>130</sup> See *Salini Costruttori, S.P.A. et al v. Kingdom of Morocco*, supra note 126.

<sup>131</sup> See Sornarajah, supra note 7, on page 54.

*total or partial control of the owner of the assets*<sup>132</sup>, (emphasis added) in order to cooperate in promoting the economic objectives of the host state.<sup>133</sup>

Furthermore, another crucial element of this definition is also found in the concepts of direct management and control of the assets by the investing company.<sup>134</sup>

This critical element helps to draw the dividing line between foreign direct investment (FDI) and portfolio investment. It has been said that the former is an example of the need to have the authorized presence of the investor in the host-state territory, whereas the latter allows participation but without the presence of the investor.<sup>135</sup> The distinction between these two concepts also helps to determine the extent of international host-state liability for the possible losses suffered by an aggrieved individual. In this regard, it has been said that it may also require taking into consideration the little-known fact that the nature of the financial and commercial risk of portfolio investment could be settled via domestic legal mechanisms.<sup>136</sup>

Nevertheless, the discussion about the inclusion or omission of portfolio investment in the concept of investment requires further research and explanation. However, this is beyond the scope of this research. Moreover, the importance of the inclusion or omission of such an item in the definition of investment depends on the intention and consent of the contracting states and to the due observance of their enabling powers granted by their internal laws.<sup>137</sup>

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<sup>132</sup> Ibid., on page 7.

<sup>133</sup> Ibid., pages 63-64.

<sup>134</sup> Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) ICJ Reports 1970, p. 3.

<sup>135</sup> See Sornarajah, *supra* note 7, on page 7.

<sup>136</sup> Ibid., on pages 8 and 16.

<sup>137</sup> For example, the ASEAN Framework Agreement on Investment specifically excludes portfolio investments; quoted by Sornarajah, *supra* note 7, on page 9.

As previously mentioned, this research will only refer to the concept of direct foreign investments, which are destined to increase welfare and prosperity within the contracting states.<sup>138</sup>

#### vi. The contracting states of BITs

One of the most essential characteristics of BITs is that they are consensual agreements,<sup>139</sup> i.e., two legal persons are required.<sup>140</sup>

In this case, two sovereign states are required. These states are subjects of public law<sup>141</sup> (at national<sup>142</sup> and international<sup>143</sup> levels). With regard to the public law nature of the contracting parties, it has been said that they are '[entities] capable of possessing international rights and duties and have the capacity to maintain [their] rights by bringing international claims'.<sup>144</sup>

Such capacity is linked to the following concepts: (i) 'capacity to make claims in respect of breaches of international law'; (ii) 'capacity to make treaties and agreements valid on the international plane'; and, (iii) 'the enjoyment of privileges and immunities from national jurisdictions'.<sup>145</sup> Following these ideas, neither national individuals nor

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<sup>138</sup> See Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009 <[http://www.thedti.gov.za/ads/bi-lateral\\_policy.pdf](http://www.thedti.gov.za/ads/bi-lateral_policy.pdf)> (Last visit 03/10/2009). See also *the Salini Test* in *Salini Costruttori, S.P.A. et al v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) July 16, 2001 – Decision on Jurisdiction. 42 ILM 609 (2003).

<sup>139</sup> See supra note 44.

<sup>140</sup> In other words, to possess *full legal capacity* which has been understood as 'the ability to be vested with rights, powers, and obligations.' Nonetheless, in terms of concluding treaties, it is also important to consider the full powers of the authority to negotiate, sign and seal an IIT in accordance with the principle of legality. See Cassese, supra note 64, on page 71.

<sup>141</sup> See Brownlie, supra note 21, pages 57-67; and Cassese, supra note 64, pages 71-80.

<sup>142</sup> In this regard, it has been said that 'municipal law normally includes special provisions on the "birth" of juridical subjects. [omissis]...the application of such rules constitutes a kind a precondition to the operation of all other substantive and procedural norms.' See Cassese, supra note 64, on page 72.

<sup>143</sup> With regard to the international level, it has been stated that '[b]y contrast, there is no international legislation laying down detailed rules concerning the creation of States'. This *lacuna* is filled by customary international rules. See Cassese, supra note 64, pages 72-73.

<sup>144</sup> See, e.g., *Reparation for Injuries case*, ICJ Reports (1949), 179; quoted by Brownlie, supra note 21, on page 57. See also Jaffe Carbonell, supra note 21, on page 249.

<sup>145</sup> See Brownlie, supra note 21, on page 57.



foreign investors can be considered to be traditional subjects of public international law.

In this regard, it is important to stress that it is clear that the state and individual public law relationship is based on the public law nature of one or both of the contracting parties, in addition to the public law capacity with which they act and the public interest involved. It will also be important to determine the public law nature of the agreement as a whole. For example, in the present case of BITs, the public law nature of the agreement is not only determined by the public law nature of one of the contracting parties, but also by the public law nature of both contracting parties.

Finally, as in any contractual relationship, the contracting parties to a BIT have their interests and their conflicts. Both positions are addressed in the following sub-sections in a general manner.

- Contracting state's interests

The main interest on the part of the contracting states is mainly found in the preamble of a BIT. In the preamble, the contracting parties express their mutual intention in the majority of BITs, the main aim or interest is (i) the promotion of economic cooperation between the contracting parties; (ii) the reciprocal benefit to both parties; and (iii) the protection of their national investors and their investments.<sup>146</sup>

Generally speaking, it can be assumed that the economic cooperation in question is centralised in areas of the parties' public interest (e.g., construction, transportation, exploitation of natural resources, etc). Hence, this type of cooperation is basically

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<sup>146</sup> See, e.g., the preamble of the Venezuela-Vietnam BIT; the Venezuela-Belarus BIT; the Venezuela-Barbados BIT; the USA-Argentina BIT; the USA-Ecuador BIT; the USA-Panama BIT; the Colombia-Peru BIT; the Colombia-Switzerland BIT; the Colombia-UK BIT; the Colombia-Spain BIT; the Colombia-Chile BIT; and the Colombia-Cuba BIT.

destined to improve the development or welfare of one of the parties (i.e., the host state) and to benefit the other party's nationals.<sup>147</sup>

- Contracting state's conflicts

It is necessary to mention from the outset that any conflict between contracting parties, resulting as a consequence of the breach of a BIT provision, should be settled through treaty-based arbitration in accordance with the rules of international law in particular with the provisions of the Vienna Convention (material breach).<sup>148</sup> Nevertheless, conflicts are a result of the double law effect of BITs. For example, the public law effect between contracting states and the public law effect between the host state as a contracting party and an investor of the other contracting party. The latter case, in essence, largely refers to an investor/host-state regulatory conflict *when the host -state exercises its public power* and breaches a given BIT's provisions.

Such investor/state regulatory conflict has, as a consequence, a different problem related to the contractual conflict between contracting states, particularly if the vague notion of FET standard is taken into consideration. Conversely, this is a regulatory problem or conflict that mainly arises when a host state needs to exercise its regulatory power which, as a consequence, impacts upon the investor's interests.<sup>149</sup> This problem is similar to the domestic regulatory conflict that takes place when the public administration exercises its public authority and in doing so affects the interests of private individuals.<sup>150</sup>

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<sup>147</sup> See W. Peter, Arbitration and Renegotiation of International Investment Agreements (Second Edition, Kluwer Law International, The Hague, Boston, London 1995), on page 13.

<sup>148</sup> This will give grounds to invoke the termination or suspension of the treaty. See Brownlie, *supra* note 21, pages 622-623; and Cassese, *supra* note 64, pages 180-182.

<sup>149</sup> See Peter, *supra* note 147, pages 12-15.

<sup>150</sup> See *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 57. See also Van Harten, *supra* note 2; and G. Van Harten, and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, EJIL (2006) Vol. 17 No. 1, pages 121-150.

Thus, it has been argued that this conflict may create a kind of contradictory picture for two main reasons: (i) the interest of the host state to attract investment, on the one hand, and, (ii) the urgent need of the host state to regulate the country's activities in order to protect the national welfare, on the other hand.<sup>151</sup>

It is within the context of the dual-role of the host state that the legal international investment apparatus starts to work and conflicts with domestic (administrative) law principles.<sup>152</sup>

In relation to this conflict, it is appropriate to mention here, with regard to the exercise of a host state's regulatory power and the treaty-based state-investor relationship, the application of the well-known principle of domestic administrative law (existing in both French and British administrative legal systems). This principle establishes that the Crown or the state cannot hamper her/its freedom of executive action by contract.<sup>153</sup>

This latter point is completely different to the traditional debate between the coexistence of the international principle which states that 'a [state] may not invoke the provisions of its internal law [including its domestic (administrative) law principles] as justification for its failure to perform a treaty'.<sup>154,155</sup> For further explanation of this latter argument see sub-section ix) analogy with some principles of domestic administrative law.

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<sup>151</sup> See Sornarajah, *supra* note 7, on page 101

<sup>152</sup> The state-investor dispute has largely arisen on grounds of the (lawful or unlawful) regulatory conduct of the host state.

<sup>153</sup> See G. Shalev, *Administrative Contracts* 14 Isr. L. Rev. 444 (1979), on page 457; G. Langrod, *Administrative Contracts* 4 Am. J. Comp. L 325 (1955), on page 332; and sub-section b) of chapter II.

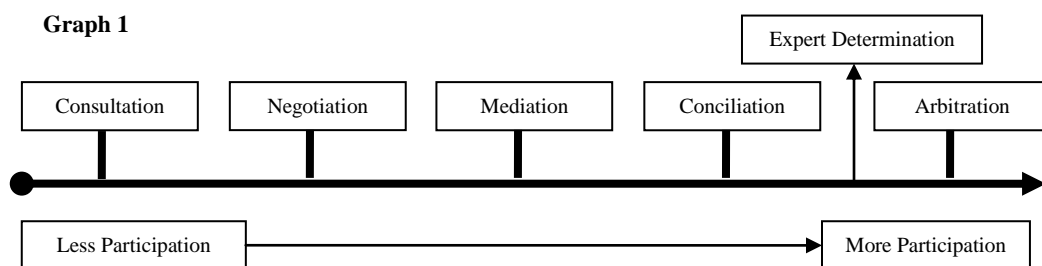
<sup>154</sup> Article 27 of Vienna Convention on the Law of Treaties (1969) United Nations, *Treaty Series*, vol. 1155, on page 331.

<sup>155</sup> See, e.g., D. E. Vielleville, and B. S. Vasani, *Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?* Transnational Dispute Management Vol. 5, Issue 2 (2008), on page 13.

- The need to include conflict mechanisms in order to settle BIT disputes.

As in any contractual relationship, the contracting parties always seek to have legal remedies in place before a breach of contract takes place.<sup>156</sup> In this regard, the primary interest of the contracting states to a BIT is to settle their differences or conflicts in advance through diplomatic channels and/or in an amicable manner.<sup>157</sup>

It is relevant to note that the contracting states have decided to incorporate various mechanisms to settle their differences into the BIT structure. These mechanisms range from consultation; negotiation; to arbitration (see e.g., graph 1).<sup>158</sup>



Source: UNCTAD, 2011.<sup>159</sup>

In relation to arbitration, there are two different levels to address in BIT disputes.<sup>160</sup> For example, the first level has been drawn up for matters concerning disputes between contracting states. The majority of BITs establish generally that:

<sup>156</sup> See e.g., Cohen and McKendrick., supra note 48.

<sup>157</sup> See, e.g., article 8 (1) of the Venezuela-Vietnam BIT, and of the Venezuela-Belarus BIT; article 12 (1) of the Colombia-Peru BIT; article 11 (1) of the Colombia-Switzerland BIT; article 10 (2) of Colombia-Spain BIT; and article 12 (1) of the Colombia-Cuba BIT, among other. See also Sornarajah, supra note 7, pages 249-250.

<sup>158</sup> It is important to highlight that before solving the state's failure through arbitration; the contracting parties provided (for both levels) a prudential time to consult and negotiate the disputable issue. This time goes generally from three to six months. See, e.g., article 8(2) of the Venezuela-Vietnam BIT and of the Venezuela-Belarus BIT; articles 12 (2) and 13 (2) of the Colombia-Peru BIT; articles 11 (2) and 12 (2) of the Colombia-Switzerland; article 10 (2) of Colombia-UK BIT; articles 9 (2) and 10 (3) of the Colombia-Spain BIT; articles 9 (2) and 10 (2) of the Colombia-Chile BIT; and articles 12 (2) and 13 (2) of the Colombia-Cuba BIT.

<sup>159</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note, No. 1, March 2011 <[http://www.unctad.org/en/docs/webdiaeia20113\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20113_en.pdf)> (Last visit 25/06/2011), on page 22.

<sup>160</sup> See, e.g., articles 8 and 9 of the Venezuela-Vietnam BIT, of the Venezuela-Belarus BIT, and of the Venezuela-Barbados BIT; articles 7 and 8 of the USA-Argentina BIT, and of the USA-Panama BIT; articles 6

Any dispute between the contracting parties concerning the interpretation or application of the BIT which is not resolved through *consultations or other diplomatic channels*, shall be submitted, upon the request of either contracting party, to *an arbitral tribunal for binding decision* in accordance with the applicable rules of international law.<sup>161</sup> (Emphasis added)

The second level has been drawn up for investment matters related to disputes between one contracting party and the national or company of the other party, i.e., ‘investment disputes’. The majority of BITs also establish in a general way that:

[I]n the event of an investment dispute, the parties to the dispute should initially seek a resolution through *consultation and negotiation*. If the dispute cannot be settled amicably, the national or company concerned *may choose to submit the dispute... for settlement by binding arbitration* to [ICISID or UNCITRAL rules].<sup>162</sup> (Emphasis added)

It must be emphasized that both levels are neither hierarchal nor instance levels. They are just independent mechanisms that have been conceived to deal with the possible failure of one of the contracting states to fulfil their obligations (standards of treatment), which have been mutually agreed by the contracting states in a given IIT.<sup>163</sup> Thus, under the idea that a breach of contract requires compensation, it has been generally assumed that in the case of a state’s failure to achieve the said standards, compensation must be negotiated and/or paid to the aggrieving state.<sup>164</sup>

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and 7 of the USA-Ecuador BIT; articles 12 and 13 of Colombia-Peru BIT; articles 11 and 12 of the Colombia-Switzerland BIT; articles 9 and 10 of the Colombia-Spain BIT and the Colombia-Chile BIT; and articles 12 and 13 of the Colombia-Cuba BIT. See also Sornarajah, *supra* note 7, on page 250.

<sup>161</sup> See, e.g., article 9 of the Venezuela-Vietnam BIT, of the Venezuela-Belarus BIT, and of the Venezuela-Barbados BIT; article 8 of the USA-Argentina BIT and of the USA-Panama BIT; article 7 of the USA-Ecuador BIT; article 13 of Colombia-Peru BIT; article 12 of the Colombia-Switzerland BIT; article 9 of the Colombia-Spain BIT and of the Colombia-Chile BIT; and article 13 of the Colombia-Cuba BIT

<sup>162</sup> See, e.g., article 8 of the Venezuela-Vietnam BIT, of the Venezuela-Belarus BIT, and of the Venezuela-Barbados BIT; article 7 of the USA-Argentina BIT and of USA-Panama BIT; article 6 of the USA-Ecuador BIT; article 12 of Colombia-Peru BIT; article 11 of the Colombia-Switzerland BIT; article 10 of the Colombia-Spain BIT and of the Colombia-Chile BIT; and article 12 of the Colombia-Cuba BIT.

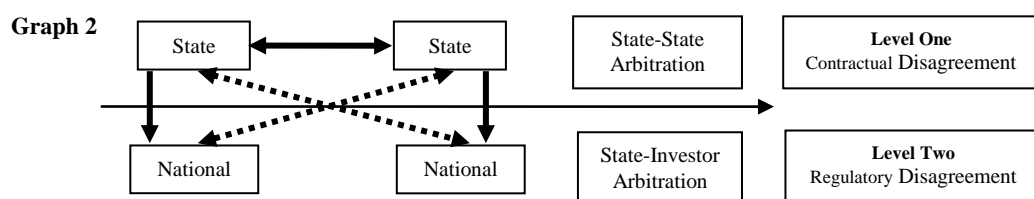
<sup>163</sup> Sornarajah, *supra* note 7, on page 140.

<sup>164</sup> *Ibid.*, on page 32.

This is an appropriate context in which to recall the idea that the mechanism to settle disputes resulting from the violation of BIT provisions is known as ‘investment treaty arbitration’.<sup>165</sup> Similarly, the investment treaty arbitration tribunal has also been regarded as an *ad hoc* and temporary tribunal.

Furthermore, despite the argument that ‘international arbitration... lies in the idea of neutrality between states, and not between investors and states’,<sup>166</sup> this mechanism has been considered to address disputes not only between states (contractual disagreement) but also between a contracting state and a national investor of the other contracting state (mainly regulatory disagreements). The incorporation of individuals into this system has been based on the suspicion that ‘domestic tribunals would not provide objective justice to a foreign investor’.<sup>167</sup>

As mentioned above, these contractual and regulatory disagreements give rise to two levels or two types of settlement of disputes between parties, i.e., state-state arbitration and state-investor arbitration<sup>168</sup> (see e.g., graph 2).



<sup>165</sup> The Legal Dictionary defines arbitration as ‘... the submission of legal controversies, by agreement of the parties thereto, to persons chosen by themselves...’ See S. H. Gifis, Law Dictionary (Barron’s Legal Studies, USA 1996), on page 30.

<sup>166</sup> See Van Harten, *supra* note 2, on page 131.

<sup>167</sup> Similarly, it has also been said that ‘[i]nvestors attempt to keep issues out of the national courts [of host states] by appropriate clauses on jurisdiction in the case of a dispute and on choice of applicable law’. See Brownlie, *supra* note 21, on page 545; and Sornarajah, *supra* note 7, on pages 149 and 250.

<sup>168</sup> This is a special mechanism for the foreign investor to seek remedies for their injured rights which have been established by a given treaty. Sornarajah, *supra* 7, on page 13.

It is in relation to this topic that the question about the legal nature of this second-level mechanism of settling disputes arises. In other words, this question refers to whether this investment treaty arbitration mechanism can be compared to any public legal resolutions that are available in a given domestic legal system, particularly if the legal nature of international regulatory disputes is taken into consideration. Can the arbitral tribunal when settling regulatory issues be compared to those tribunals or courts that exist within the structure of a given domestic legal system? If one takes into consideration the public law nature of the contracting parties (sovereign states), the public law nature of the agreement (BITs); and the public law nature of the BIT's subject matter (promotion of economic cooperation to their reciprocal benefit), then the answers to these questions will be found in the functions of this (voluntarily state-state agreed) investment tribunal.

Notwithstanding, attention must be given to the fact that the main idea of arbitration as a mechanism to settle disputes between contracting states and their nationals is mainly based on the idea of promoting and protecting the investment flow between them.<sup>169</sup> Accordingly, the regulatory nature of an arbitral issue of a given investment dispute will depend largely on the public law subject matter of the said investment, on the regulatory conduct of one of the contracting parties (i.e., the host state), and how such a regulatory conduct undermines the main objective of a given BIT and its provisions.<sup>170</sup> In fact, it has been said that in the end: '[t]he enforcement of international law depends, to a significant extent, on state self-regulation'.<sup>171</sup>

Another aspect of importance regarding this point is the one related to the principle of state immunity. This is limited by the contracting states when they decide to conclude a

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<sup>169</sup> Ibid., on page 256.

<sup>170</sup> Ibid., on page 256.

<sup>171</sup> See Picker, *supra* note 12, on page 1090.

given BIT.<sup>172</sup> Consequently, at the moment that a state decides to conclude a treaty (including a BIT), it is surrendering part of its immunity of jurisdiction. This idea is fundamentally based on two principles that are related to state immunity.

As Professor Sornarajah pointed out, these two principles are (i) the maxim '*par in parem non habet imperium*' (i.e., a sovereign state cannot exercise jurisdiction over another sovereign state), and (ii) the principle of 'non-intervention in the internal affairs of the other states'.<sup>173</sup>

Additionally, another principle that can be incorporated into the two previous ones is the fundamental procedural principle that states 'no one should be judge of his own cause'.<sup>174</sup> Based on these principles, the contracting parties have been mutually convinced to agree on submitting their treaty-based disputes to treaty-based arbitration as a way of creating a neutral forum. Thus, they have agreed to create a kind a temporary 'supranational tribunal' to deal with disputes arising from a particular BIT.

An additional element regarding investment treaty arbitration and state immunity is the debate on the distinction of those state acts by right of dominion (i.e., *Acta Jure Imperii*) and those state acts by right of management (i.e., *Acta Jure Gestionis*). It has been said that the latter case denies the immunity from jurisdiction by assimilating these acts to those acts of commercial nature.<sup>175</sup>

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<sup>172</sup> It has been stated that '[t]he "immunity" is not absolute, for it can be waived; and there are limits and exceptions varying with the nature of the occasion for the licence'. See Brownlie, *supra* note 21, on page 327.

<sup>173</sup> 'The immunity is primarily from the jurisdiction of the territorial courts, but it has other facets'. See Brownlie, *supra* note 21, on pages 325 and 326.

<sup>174</sup> See Jacobs and Roberts, *supra* note 38, on page 52.

<sup>175</sup> See Brownlie, *supra* note 21, pages 327-328.



Nevertheless, the concern arises at the moment when investment arbitrators are faced with one or both types of these acts, as they may therefore be required to review the nature and effects of these acts.

Consequently, it has been said that this kind of investment arbitral practice exposes ‘the democratic legitimacy of arbitral tribunals’ since they exercise an ‘extensive supervisory control over decisions of judicial and administrative organs of states’.<sup>176</sup> In this particular regard, it has also been said that there could be ‘some wide interpretation of state consent’ because the investment arbitral tribunal is required to pronounce on issues of public interest.<sup>177</sup>

It has been pointed out that ‘a satisfactory mode of application of the principle of restrictive immunity has yet to be developed’.<sup>178</sup> Perhaps one of the reasons is the difficulty of reconciling the notion of absolute immunity with the notion of public policy.<sup>179</sup> In fact, within this context, the tradition so far has been that any regulatory dispute between an individual and the state is subject to the jurisdiction of domestic courts.<sup>180</sup>

As a final remark, these treaty-based dispute-solving mechanisms, including arbitration, have been considered to be neutral mechanisms and an alternative to domestic courts settling BIT disputes.<sup>181</sup> However, this will also depend on the will of the contracting parties. In some cases, before a treaty violation takes place, the parties may have agreed to exhausting local remedies before resolving the dispute through a

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<sup>176</sup> See Sornarajah, *supra* note 7, on page 343.

<sup>177</sup> *Ibid.*, on page 343.

<sup>178</sup> See Brownlie, *supra* note 21, on page 333.

<sup>179</sup> *Ibid.*, on page 330.

<sup>180</sup> *Ibid.*, on page 333.

<sup>181</sup> See A. G. Adaralegbe, Concurrent Jurisdiction Between Treaty and Domestic Tribunals: An Examination of Jurisdiction-Regulating Mechanisms Within the Investor-State Treaty Arbitration System and Their Effectiveness (CEPMLP, University of Dundee, PhD Thesis, 2009).

treaty-arbitration (known as the ‘fork-on-the-road’ provision).<sup>182</sup> Finally, most arbitral proceedings have been agreed to be subject to and governed by procedural rules of the ICSID and UNCITRAL.<sup>183</sup>

vii. The location of international investment treaties within a state’s legal system

Under the premise that ‘treaties are made to be performed’,<sup>184</sup> the best manner to locate BITs within a given state’s legal system is through the traditional international theories of monism and of dualism. These positions have emerged from the idea that dualism considers there to be a total separation between the national juridical order and the international juridical order (Triepe’s school), whereas monism does not recognise such a separation (Kelsen and George Scelle’s school).<sup>185</sup>

It has been argued that the relationship between municipal law and international law represents a clash between these two theories.<sup>186</sup> This clash is mainly based on the subject matter of both national and international laws. This is to say that while public international law (formerly known as the ‘law of nations’) mainly regulates the relationship between sovereign states, municipal law, in comparison, is mainly applicable to the relationship between the state, i.e., the executive power, and its citizens.<sup>187</sup> This particular point requires special attention when account is taken of the

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<sup>182</sup> See, e.g., article 10 (1) of the Colombia-Spain BIT. See also Tejera Perez, *supra* note 26.

<sup>183</sup> See, e.g., article 13 of the Germany-Trinidad and Tobago BIT; article 9 of the China-Bahrain BIT; article 8 of the Venezuela-Vietnam BIT; article 8 of the Venezuela-Belarus BIT; article 8 of the Venezuela-Barbados BIT; article 7 of the USA-Argentina BIT; article 6 of the USA- Ecuador BIT; article 7 of the USA-Panama BIT; article 12 of the Colombia-Peru BIT; article 11 of the Colombia-Switzerland BIT; article 9 of the Colombia-UK BIT; and article 10 of the Colombia-Spain BIT.

<sup>184</sup> See Reuter, *supra* note 39, on page 20.

<sup>185</sup> See Jaffe Carbonell, *supra* note 21, on page 21.

<sup>186</sup> See Brownlie, *supra* note 21, on page 31.

<sup>187</sup> *Ibid.*, pages 31-32.

fact that a BIT, as any international agreement, reduces the scope of immunity of the contracting parties involved.<sup>188</sup>

Furthermore, unlike the monist theory, under the theory of dualism, a BIT needs to be incorporated into the state's legal order through the approval of the National Congress or Assembly in order for it to become enforceable. One of the main arguments of doing this, as pointed out by the doctrine, is the presence of municipal law and its position of priority in application by municipal courts in case of conflict with international law.<sup>189</sup> Conversely, the monism theory simply assumes the supremacy of international law 'even within the municipal sphere'.<sup>190</sup>

Following the idea of applying municipal law to ensure the correct application of some treaty obligations, a concern presents itself about the coexistence of the state's regulatory power (state's control) and those rights and obligations (standards of treatment, in particular the FET standard) that are stipulated for the direct benefit of individuals in BITs.<sup>191</sup> It has been asserted that ISTA is described as 'a unique internationalized arm of the governing apparatus of states, one that employs arbitration to review and control the exercise of public authority'.<sup>192</sup> Additionally, it has been stated that '[s]uch [coexistence] has raised and continues to raise a number of practical problems'<sup>193</sup> and that this problem '... also lies behind the theoretical debates on the dualism and monism'.<sup>194</sup>

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<sup>188</sup> See Dolzer, *supra* note 108, on page 953.

<sup>189</sup> In fact, under the major legal systems, such as the legal systems of Britain and France, it is common consensus that 'a treaty has no effect... unless it is made part of domestic law. Only a treaty that is incorporated [into municipal law] is fully cognisable in the courts'. Similarly, it has also been asserted that 'If a treaty conflicts with statute or even common law the latter will prevail.' See Jacobs and Roberts, *supra* note 38, on pages 125 and 129; and Brownlie, *supra* note 21, pages 31-32.

<sup>190</sup> See Brownlie, *supra* note 21, pages 31-32.

<sup>191</sup> See Reuter, *supra* note 39, on page 20; and Sornarajah, *supra* note 7, on page 305.

<sup>192</sup> See Van Harten, *supra* note 2, on page 70.

<sup>193</sup> See Reuter, *supra* note 39, on page 20.

<sup>194</sup> *Ibid.*, on page 20.

In any case, one may assume that such coexistence could be significantly improved if one takes into consideration that, due to the diffuse and vague nature of the FET standard at the international level, municipal law contains a good reference of legal principles, which could be used in resolving international regulatory disputes.<sup>195</sup> To support this idea, it has recently been stated that ‘[t]he connection of domestic legal systems is immediately apparent when considering... [public international law] sources.’<sup>196</sup>

As a complementary element to this coexistence, it is important to draw attention to the fact that once foreign individuals and their properties have entered a given state’s jurisdiction, both are primarily subject to the law of the host state.<sup>197</sup> (See the following sub-section viii: Submission of individuals to this legal system).

Additionally, despite the argument concerning the supremacy of international law over municipal law, customary international law has recognised that an entrance of foreign individuals and their properties into a given state is largely governed by the sovereign prerogatives of that state.<sup>198</sup> It has even been pointed out that ‘it is up to each State and its Constitution to ensure the correct application of treaties’.<sup>199</sup>

In summary, the application of these two theories, and the effects of BITs, depends greatly on those general principles and practices that are a key factor not only in international law, but also in a given constitutional and administrative legal system.

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<sup>195</sup> In this regard, it has been stated that ‘[t]he international law system lacks a central legislature to enact legislation; there is no executive to apply or enforce the law that is made; and there is no centralized judiciary to interpret the law and adjudicate disputes’. See J. L. Dunoff, S. R. Ratner, and D. Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* 35, (2<sup>nd</sup> ed. 2006); quoted by Picker, *supra* note 12, on pages 1086 and 1087.

<sup>196</sup> *Ibid.*, on page 1092.

<sup>197</sup> See Sornarajah, *supra* note 7, on page 98.

<sup>198</sup> See Reuter, *supra* note 39, on page 23; Brownlie, *supra* note 21, on page 32; and, Sornarajah, *supra* note 7, on page 311.

<sup>199</sup> See Reuter, *supra* note 39, on page 22.

Thus, the question now is whether the legal principles of domestic administrative law can be applied to some of the rules relating to the breach of BIT provisions, and perhaps to ascertain whether these principles can be applied to the mechanisms provided by the contracting parties to settle state/investor disputes, in particular, regulatory disputes. Further to this, it must be established in which ways these mechanisms can be applied.

#### viii. Submission of individuals to this legal system

As a general idea, based on the principle of legality, everyone is subject to the rule of law. For this reason, it has been said that a BIT limits ‘the sovereign right of a state to subject investors to its domestic administrative legal system’.<sup>200</sup> That is to say, a BIT establishes the minimum international standards of treatment which determines the legality of the regulatory conduct of the host state. These standards of treatment represent a kind of limitation to the state’s regulatory power and the manner in which a foreign investor must be treated within the territory of a certain host state.

Based on the concept of the contractual nature of BITs, it can be affirmed *a priori* that the states, as contracting parties, are subjects and are subjected primarily to the treaty’s provisions because of their express consent (i.e., *lex specialis*) and then subsequently to the law in general (i.e., *lex generalis*).<sup>201</sup>

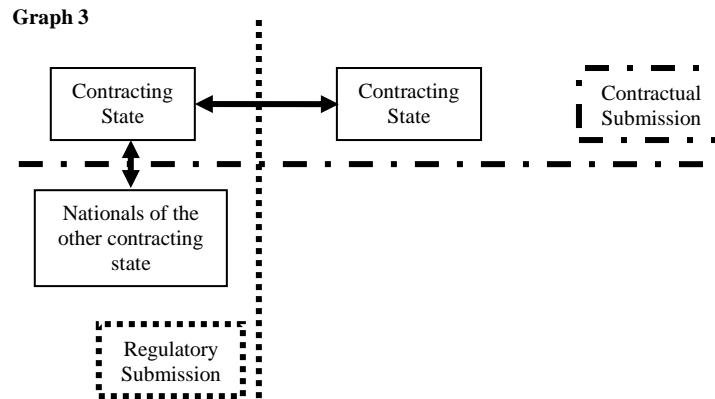
However, based on the idea of considering BITs as international regulatory instruments and their respective incorporation into the state’s legal system (dualism theory), there are questions concerning the two types of submissions. Firstly, the *contractual submission* is the one that exclusively governs the relationships between the contracting

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<sup>200</sup> See Dolzer, *supra* note 1087, on page 953.

<sup>201</sup> See Cassese, *supra* note 64, pages 170-173.

parties, i.e., sovereign states (public international law). Secondly, the *regulatory submission* is one that applies to the relationship between one of the contracting parties (i.e., the host state) and private individuals (i.e., foreign investors who are the direct beneficiaries of a BIT) (public international and national laws). (See Graph 3).



In the latter circumstance, the relationship cannot be assimilated into the contractual submission for two main reasons: (i) due to the unequal legal status of a state and a private individual, and (ii) due to the fact that private individuals are automatically subject to the treaty provisions as well as to the exercise of public authority in the host states.<sup>202</sup> Conversely, this regulatory submission can be compared to the regulatory submission that exists within the domestic state/individuals regulatory relationship (see also graph 4) (i.e., it is regulated primarily by administrative law principles). In fact, it is in accordance with domestic law that private individuals acquire their legal capacity. However, despite this legal capacity, they still lack the power to negotiate treaties. Therefore, for this reason, it can be affirmed that both states and individuals are not only subject to BITs provisions, but also subject to the law in general i.e., *lex generalis* (international law and national laws).

<sup>202</sup> See Van Harten and Loughlin, *supra* note 150, on page 148.

Generally speaking, they are all obliged to obey the law. This obedience is mainly founded, amongst other principles, on the maxim which states that '*ignorantia juris non excusat*' (i.e., ignorance of law is not an excuse), consequently drawing awareness to the content and effects of the law.<sup>203</sup>

Moreover, obedience to the law is also due to the idea that states have been vested with a monopoly of coercive power and, therefore, they are empowered to affect the lives and rights (on grounds of the public interest) of those individuals (nationals and foreigners) that are in their territorial frontiers.<sup>204</sup> This is also based on the fact that laws and regulations are imposed on individuals from outside their personal sphere, due to the fact that norms are adopted by public authorities as part of the state's public system. These norms have been adopted to be obeyed by individuals within the framework of the principle of legality.<sup>205</sup>

In the specific case of BITs, when an investor takes the decision of entering, in accordance with the principles established by public international and national laws,<sup>206</sup> the frontiers of a given host state, he/she is conscious that both he/she and his/her property are subject to the national law of that state.<sup>207</sup> This is to say, the regulatory submission of an investor to the host state's national law is not only done in accordance the principle of legality, but also with those legitimate interests of both the host state and the investor (including social and economic interests).<sup>208</sup> Consequently, it has been

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<sup>203</sup> Article 2 of the Venezuelan Civil Code.

<sup>204</sup> See Slaughter and Ratner, *supra* note 16, on page 258.

<sup>205</sup> See Jaffe Carbonell, *supra* note 21, on page 45; and Van Harten and Loughlin, *supra* note 150, on page 148.

<sup>206</sup> In this context it has been submitted that it is 'doubtful whether foreign investments made in transgression of the host state's law are entitled to any protection under international law.' See, e.g., *Shottv v. Iran* (1989) 23 Iran-US CTR 351; quoted by Sornarajah, *supra* note 7, on page 130.

<sup>207</sup> See *Genin v Estonia* where the tribunal 'recognized the primacy of the regulatory laws of the host state and the need for the foreign investor to comply with them'; quoted by Sornarajah, *supra* 7, on pages 98 and 338.

<sup>208</sup> See Brownlie, *supra* note 21, on page 28; and Sornarajah, *supra* note 7, on pages 64 and 424.

said that '[i]nternational law also has to respond to these changes [ in interests]'.<sup>209</sup> Otherwise, there could be potential problems due to the fact that, 'the characterization of the investor-state relationship' could 'alter the nature of the rights and duties of states'.<sup>210</sup> Moreover, it is of importance to highlight that BITs, their effects, and the waiver of state sovereignty in favour of their provisions, are not excluded from these observations.

Obviously, the application of these observations, in the case of BITs, will heavily depend on the consent of the contracting states as a pre-requisite to create mutual obligations at both national and international levels. For example, sometimes, in treaties, the parties expressly provide provisions through which they recognise and respect the regulatory power of the host state. Evidences of this latter point can be found in the 2012 U.S. Model Bilateral Investment Treaty; in the Trans-Pacific Partnership (TPP) Draft Investment Chapter (June 2012) and in the Draft Model Norwegian Bilateral Investment Treaty (2007). However, areas of regulation belonging to the contracting states, such as, health and safety, labour and safety and environment<sup>211</sup> are excluded from the scope of the application of the above-mentioned documents. Additionally, a wider exception is found in the Asean Comprehensive Investment Agreement (ACIA)(2012) where the contracting states right to regulate is extended to areas such as public morals; public order; protection of human, animal or plant life; health; safety; taxes; protection of national treasures of artistic, historic and

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<sup>209</sup> See Sornarajah, supra note 7, on page 64.

<sup>210</sup> W. Friedmann, *Law in Changing Society* (2<sup>nd</sup> edition, London: Stevens & Sons, 1964), 276-7; quoted by Van Harten, supra note 2, on page 130.

<sup>211</sup> See article 12.15 of the Trans-Pacific Partnership (TPP) Draft Investment Chapter (June 2012). Available at: <<http://www.bilaterals.org/spip.php?article21643>> (Last visit 10/07/2012); articles 12 and 13 of the 2012 U.S. Model Bilateral Investment Treaty. Available at: <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> (Last visit 10/07/2012) and article 12 of the Draft Model Norwegian Bilateral Investment Treaty (December 19, 2007). Available at: <<http://www.asil.org/ilib080421.cfm#t1>> (Last visit 10/07/2012).



archaeological value; and the conservation of exhaustible natural resources and financial services.<sup>212</sup>

A similar position has also been adopted through the formula of protecting investments only if they have been ‘made in accordance with the laws, policies and regulations’ of the host state.<sup>213</sup> Here the question will be whether the investor, as a direct beneficiary of a BIT, also needs to give his/her consent to be protected by a BIT’s provisions or whether it can be understood that the investor is just another individual who is subject to this legal relationship and therefore, is subject to the state’s legal system. In any case, it has been asserted that ‘states are becoming more like individuals in domestic systems, and international law is becoming more like domestic legal systems’.<sup>214</sup>

Apart from following the dualism theory which establishes that a treaty must be promulgated like legislation in order to have the force of legislation, it can be assumed that the regulatory submission of individuals to the national law represents the current debate about the binding nature of treaties for courts and individuals, and the inclusion of other non-legislative issues (i.e., public interest) which are part of the public order in any host state.<sup>215</sup>

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<sup>212</sup> See article 17 of the Asean Comprehensive Investment Agreement (ACIA), signed at Cha-am, Thailand on 26/02/2009, entered into force 29/03/2012. Available at: <<http://www.asean.org/documents/FINAL-SIGNED-ACIA.pdf>> (Last visit 10/07/2012).

<sup>213</sup> See also article 1; of the Bulgaria-China BIT; of the China-Bahrain BIT; and the Venezuela-Vietnam BIT. See also Sornarajah, *supra* note 7, on page 266.

<sup>214</sup> See Picker, *supra* note 12, on page 1091.

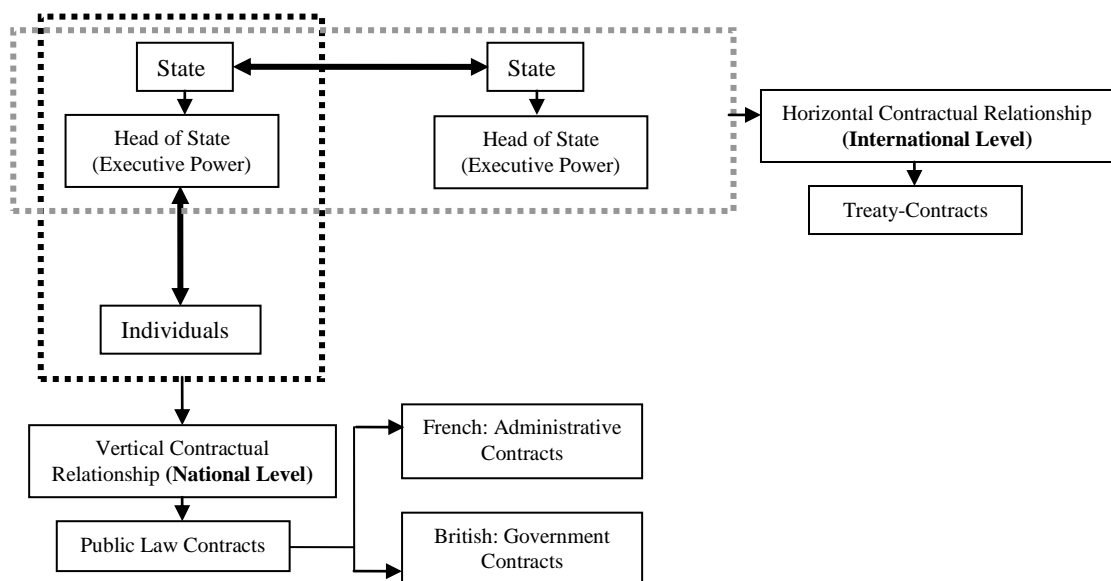
<sup>215</sup> There have been different views on the application of domestic law to international obligations. For example, ‘writers have developed a number of rather abstract constructions based on either dualistic or monistic tenets. Essentially, dualists regard international and municipal law as completely separate, except for the Head of the State who is the only State organ entitled to represent the State both in municipal and international law. On the other hand, monists hold that municipal law is linked and subject to international law with regard to all State organs. In fact, monism could also be characterized as a system of legal integration; international and municipal law can be said to be ‘integrated’ when both become one coherent and hierarchical system such as would be the case in a highly developed federal system with respect to federal and state law’.’ See Reuter, *supra* note 39, on page 17; and Jacobs and Roberts, *supra* note 38, on page 59

ix. Analogy of BITs with some principles of domestic administrative law

The concept of a BIT as a treaty-contract and as a type of contract which has a public law nature requires an analysis of the current concept of a public law contract. To this end, it is of importance to highlight that even though there is the freedom of states to conclude public law agreements at international and national levels, e.g., treaties and public contracts, respectively, these agreements should not be considered private law agreements for a variety reasons, for example the fact that the prerogatives of states are not relinquished by their subscription to these BITs, as will be seen later on.<sup>216</sup>

The main argument is, as already mentioned, that these non-private-law agreements are governed by principles of public law. In fact, the contractual nature of BITs can be integrated into the public law nature and features of other public contracts belonging to the state, e.g., administrative and government contracts. (See Graph 4). This is particularly so if these BITs are being used to create or justify a secondary BIT relationship, i.e., a state/investor relationship.

**Graph 4**



<sup>216</sup> See Reuter, *supra* note 39, on page 35.

Unlike private law contracts of the state (i.e., those concluded in its private capacity), public law contracts mainly refer to those agreements that are concluded by the state but in the exercise of its public capacity and on the grounds of national public interest.

This freedom to conclude public contracts, and its effects, are mainly governed by public law principles, especially by domestic public (administrative) law principles as seen in Chapter II. Moreover, the existence of domestic administrative law can be connected to the argument which declares that the application of this law prevents states from concluding contracts in accordance with a foreign law.<sup>217</sup>

It is also important to point out that, despite the already mentioned limit of this research to notions of private and public law contracts, it needs to be said that, under the principles of both legal systems used in this research, there exists the institution of *public law contracts*. That is to say; those contracts that (i) are signed in accordance with the public capacity of the state; (ii) are signed on the grounds of the national public interest; and (iii) govern the regulatory relationship between the state and a given individual (see Chapter II).

For example, under the French system, these public contracts are mainly called administrative contracts;<sup>218</sup> whereas under the British system, they are mostly referred to as government contracts,<sup>219</sup> (see Graph 4). In both cases, despite their different classification, these contracts are used to control the domestic contractual/regulatory

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<sup>217</sup> Ibid., on page 35.

<sup>218</sup> See L. Neville Brown and J. Bell, French Administrative Law (Fifth Edition, Oxford University Press, UK 2003), pages 202-212. See also R. Badell Madrid, Régimen Jurídico del Contrato Administrativo (Rafael Badell Madrid, Caracas – Venezuela 2001) and Brewer-Carias, supra note 91.

<sup>219</sup> See Davies, supra note 75; P. Benson, The Theory of Contract Law – New Essays (Cambridge University Press, UK 2001); and Wheeler and Shaw, supra note 48.

relationship between the state (the executive branch) and individuals (national and foreigners), e.g., concessions and licences.

Similarly, these contracts also represent the regulatory submission of individuals to the state legal system. Curiously, the regulation of this internal state/individual relationship looks very similar to the regulation of the ‘alleged’ state/investor relationship that is derived from and protected by a given BIT.<sup>220</sup> For example, in *Total v Argentina* (2010),<sup>221</sup> it was stated that:

*[S]ignatories of [BITs] do not... relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed. (Emphasis added).*

Conversely, in *Perenco v. Ecuador* (2009), the arbitral tribunal stated the opposite by saying that:

*[In] ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it, the effect is necessarily to restrict the freedom of the State to act as it would wish.*<sup>222</sup>

In the case of BITs, the factors highlighted by the *Total v Argentina* arbitral tribunal are analogous the principle of domestic law that establishes that the prerogatives of the state or the Crown to exercise the freedom of executive action cannot be disadvantaged by a contract.<sup>223</sup> This simply means that the regulatory power of the state cannot be hampered, even in the case of concluding public-law and private law contracts. This premise is applicable at both national and international levels, despite the argued

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<sup>220</sup> See S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 7; and Van Harten, *supra* note 2.

<sup>221</sup> See *Total S.A. v Argentine Republic* (ICSID Case No. ARB/04/1) December 27, 2010 – Decision on Liability, paragraphs 115-116.

<sup>222</sup> See paragraph 50.

<sup>223</sup> See Shalev, *supra* note 153, on page 332.

contractual and private law nature of a BIT as a *lex specialis* and the application of the principles of *pacta sunt servanda* (agreements must be kept) and of party autonomy. BITs should be considered to have legal effects similar to any another domestic act to which private individuals are subject. In fact, it should be considered that BITs are contracts of public interest.

In this regard, it may be assumed, therefore, that the state/investor relationship is largely a regulatory relationship that also involves the incorporation of internal economic policies that may affect not only the economic activity of national individuals, but also foreign individuals.<sup>224</sup> This effect upon an individual's interest can produce some fundamental changes in circumstances in relation to the relationship between the host state and individuals.<sup>225</sup> Under the internal regulatory state/individual relationship, as in international contractual relations, a legal responsibility is created when the legal interest of one of the parties is affected. Nonetheless, this responsibility is determined chiefly in accordance with the principles developed in domestic public law.<sup>226</sup>

Another element of relevance is related to interpretation of domestic administrative law principles and the notion of public contract law. It has been pointed out that under both systems used in this research, the same public law contract may produce different interpretations.<sup>227</sup> For example, under the French system (civil law tradition), the public

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<sup>224</sup> See Brownlie, *supra* note 21, on page 520.

<sup>225</sup> It has also been said that 'The effect of the treaty would be to make the public law rights irrevocable once granted.' See Sornarajah, *supra* note 7, on page 223.

<sup>226</sup> It has been suggested that 'international responsibility does not differ, in terms of nature, from the notion of responsibility in domestic law'. See Jaffe Carbonell, *supra* note 21, on page 236; Brownlie, *supra* note 21, on page 433; and A. W. Bradley, and K. D. Ewing, Constitutional and Administrative Law (Fourteenth Edition, Pearson Longman, England 2007), pages 800-815.

<sup>227</sup> C. R. Giese, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Under International Law on the Eve of the Second Summit of the Americas?*, 32 Int'l L. 51 (1998); quoted by Picker, *supra* note 12, on page 1088.

law interest prevails over the private interest.<sup>228</sup> Conversely, under the British system (common law tradition) this dividing line is unclear, despite the fact that it is argued that the private law notion (Diceyan view) takes priority over the public law one.<sup>229</sup>

These two different approaches may also affect the interpretation of treaty-contracts at the international level.<sup>230</sup> For example, it has been said that ‘the common law [British system] and civil law [French system] approaches to interpretation produce conflicting understandings of the substantive obligations of international law.’<sup>231</sup>

In summary, the analogy of BITs to domestic public law instruments helps to determine the nature of the legal relationship, not only between contracting states but also the regulatory relationship between a contracting state and its individuals, including foreign investors. Despite the different approaches that can derive from one system to another, there are legal elements that are common to them. These are (i) the public capacity in which the state acts when signing a BIT; (ii) the public interest that is involved when concluding this type of international agreement; (iii) the mandatory submission of individuals to this regulatory framework; and (iv) the non-relinquishing of the regulatory power of the contracting states by subscribing to these public law instruments.

#### **d. Substantive principles of international investment law**

BITs, like any contractual agreement, contain a set of conventional principles or standards of treatment that contracting states must guarantee between them and to the

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<sup>228</sup> See Neville Brown and Bell, *supra* note 218.

<sup>229</sup> *Ibid.*, on page 202. See also Davies, *supra* note 75, on page 73; and Peter, *supra* note 147, on page 6.

<sup>230</sup> See Davies, *supra* note 75, pages 72-79; and Benson, *supra* note 219, on page 138.

<sup>231</sup> C. R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Under International Law on the Eve of the Second Summit of the Americas?*, 32 Int'l L. 51 (1998); quoted by Picker, *supra* note 12, on page 1088.

national investors of the other contracting party. Similarly, in accordance with the notion that BITs are treaty contracts, it is important to indicate that BITs imply the existence of the sovereign (bargain) power of the contracting parties to assume international responsibilities (obligations). This sovereign exercise of power also limits the immunity belonging to the contracting states. It is for this reason, that state-state-agreed-standards can be considered as international and reciprocal commitments between traditional public law subjects.

This sovereign power is mainly founded on the idea that there is not a superior international authority that can impose rules and obligations. As was pointed out before, these conventional obligations are adopted due to the lack of a centralized international legislative authority.

Within the bargaining power and the mutual consent of the contracting states, reciprocal obligations (also referred to as duties, rights, principles, or standards of treatment) are established for both states. Some authors have argued that these obligations might be based on the theory of obligations.<sup>232</sup>

To re-emphasize, these obligations are destined to promote and protect investments from and to the contracting parties. The performance of these obligations is mainly governed by the provisions of the Vienna Convention.

With reference to the direct beneficiaries of BITs, it has been agreed through the BIT definition of investment, that they are those individuals who undertake investments within the territory of one of the parties (i.e., the host state). As was previously pointed out, breach of these international obligations by the host state gives rise to state

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<sup>232</sup> See Jaffe Carbonell, *supra* note 21, on page 46.

responsibility. In particular, if it is argued that the breach has caused damage to the other party's nationals (i.e., to the foreign investor)<sup>233</sup>

In other words, it can be generally assumed that the domestic regulatory conduct of the host state is not only subject to internal standards of conduct but also subject to external standards of conduct. The question therefore becomes, to what extent these external standards are completely isolated from the internal standards established by the domestic constitutional and administrative law when the regulatory power of the state is under review at the international level. Here consideration must be given to the fact that the performance of these international obligations is closely connected to the domestic regulatory behaviour of the contracting states. This is to say, the exercise of the host state's regulatory power is carried out in accordance with the accomplishment of its internal standards and also along with the principle of legality and other related principles.

It is true to state that these standards are consensually incorporated into a given BIT to treat and protect foreign investments from the possible abuse of power by the host state. However, it is also true that these external standards are also conceived to protect the regulatory power of the host state.<sup>234</sup>

Many of these obligations have emerged from previous arbitral practices (e.g., *Neer v Mexico* (1926)) and have been recently integrated into the main body of a BIT. However, even though there has been an increasing tendency to codify these obligations within BIT provisions as international minimum standards,<sup>235</sup> it has been stated that the determination and limitation of their contents has not been an easy task

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<sup>233</sup> See Sornarajah, *supra* note 7, on page 104.

<sup>234</sup> *Ibid.*, on page 305.

<sup>235</sup> For the historical evolution of the notion of international minimum standards; See Newcombe and Paradell, *supra* note 104, pages 11-16.



for public law adjudicators,<sup>236</sup> due to the non-static nature of these standards and the law in general.<sup>237</sup> Moreover, it has been said that the creation of these international minimum standards has been made in order to minimize the discretionary powers of investment arbitrators at the moment of judging the contracting state's conduct.<sup>238</sup>

Nonetheless, this sub-section generally describes the main standards of treatment to foreign investments that have been internationally developed. It is the most common international obligations that are being recognized in a BIT as minimum standards acceptable to international law.<sup>239</sup> It is therefore worth mentioning the following obligations:

i. Fair and equitable treatment

The principle of fair and equitable treatment represents one of the most important international commitments of a host state, this is due to its controversial and vague nature in international (and national) law and is also related to the fact that this standard is usually linked to the transparency, consistency and stability of the manner in which a host state acts.<sup>240</sup>

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<sup>236</sup> It has been stated 'that under customary international law, for a country to violate the minimum standard of treatment of aliens requires a conduct by the Government amounting to gross misconduct, manifest injustice, an outrage, bad faith or wilful neglect of duty. Consequently, a breach of this obligation will probably be found in fewer cases than if fair and equitable treatment is associated with higher standards. From the perspective of the host countries, this would mean that the obligation to grant foreign investment fair and equitable treatment would not significantly impair the flexibility and discretion of Governments to regulate and to pursue their public policy objectives.' See, e.g., UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIT/2006/5, February 2007 <[http://www.unctad.org/en/docs/iteia20065\\_en.pdf](http://www.unctad.org/en/docs/iteia20065_en.pdf)> (Last visit 25/06/2011), on page 29.

<sup>237</sup> See Sornarajah, *supra* note 7, on page 329.

<sup>238</sup> M. Orellana, *International Law on Investment: the Minimum Standard of Treatment (MST)* Vol. 1 (3) Transnational Dispute Management (2004).

<sup>239</sup> There have been debates on the scope and application of these minimum standards. It has been stated that '[t]here has been considerable disagreement between states on the question of state responsibility for injuries to aliens. Many Latin American countries and other capital-importing countries have argued for the national standard of treatment of aliens. Capital-exporting states, however, have argued that aliens should be treated in accordance with an international minimum standard.' See Sornarajah, *supra* note 7, on page 233.

<sup>240</sup> R. Klager, *Fair and Equitable Treatment in International Law* (Cambridge Studies in International and Comparative Law, Cambridge University Press, UK 2011).

This standard consists of the host state's promise to guarantee fair and equitable treatment within its territory to the investments of national investors from the other contacting party.<sup>241</sup> Such a commitment also includes the obligation not to affect the basic expectations that were considered by the foreign investor at the time he/she undertook the investment.<sup>242</sup> In other words, it has been assumed that the host state should act in a predictable and transparent manner to avoid being considered in breach of this standard.<sup>243</sup>

Similarly, this standard has been perceived to be a mechanism to protect a foreign investor from abrupt changes to the host state's regulatory and contractual framework.<sup>244</sup> This fair and equitable treatment principle is incorporated into most BITs.<sup>245</sup> In fact, this principle is of such importance that its breach implies the breach of other related standards. For example, where it has been omitted from a certain BIT's provisions, it has been argued that '[this] standard is likely to be applicable based on the MFN clause.'<sup>246</sup>

Supporting this proposition, article 1105, numeral 1 of the NAFTA<sup>247</sup> establishes that '[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, *including fair and equitable treatment* and full protection and security' (emphasis added). With regard to this article, it has been

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<sup>241</sup> See, e.g., Article 2 (2) of the Venezuela-Vietnam BIT, the Venezuela-Belarus BIT, the Venezuela-Barbados BIT; Article 2 (a) of the USA-Argentina BIT; Article 2 (3) of the USA-Ecuador BIT; Article 2 of the USA-Panama BIT; Article 3 of the Colombia-Peru BIT; Article 4 (2) of the Colombia-Switzerland BIT; Article 3 (1) of the Colombia-UK BIT; and article 2 (3) of the Colombia-Spain BIT.

<sup>242</sup> See, e.g., *Técnicas Medios Ambientales Tecmed, C.A. (TECMED) v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) May 29, 2003 – Final Award.

<sup>243</sup> See Newcombe and Paradell, *supra* note 104, pages 255-298; and Dolzer and Schreuer, *supra* note 103, pages 119-149.

<sup>244</sup> See, e.g., *CMS Gas Transmission Company (CMS) v. The Argentine Republic* (ICSID Case No. ARB/01/8) May 12, 2005 – Final Award.

<sup>245</sup> A. Reinisch, *Standards of Investment Protection* (Oxford University Press, UK 2009), on page 113.

<sup>246</sup> See Newcombe and Paradell, *supra* note 104, on page 255.

<sup>247</sup> North American Free Trade Agreement (NAFTA); signed on 17 December 1994 and entered into force on 1 January 1994.

argued to have given grounds for intense discussion about the relationship between this fair and equitable standard and customary international law.<sup>248</sup>

Additionally, it is important to note that it has been stated that violation of this standard may also imply violation of other standards, such as national treatment and most-favoured-nation treatment.<sup>249</sup> In this regard, it has been said that ‘[i]n modern treaties, a fair and equitable standard of treatment is to be provided to investors and investments in addition to the international minimum standard and full protection and security’.<sup>250</sup>

Nonetheless, it has been argued that the content and meaning of this standard is not clear at all.<sup>251</sup> On the contrary, it pretty much depends on the specific wording of each treaty and each investment arbitrator’s interpretation. Additionally, there is the fact that the content and meaning of this standard is constantly evolving, even though this standard constitutes the main foundation for numerous BIT claims.<sup>252</sup>

On the other hand, it has also been pointed out that the application of this standard is also connected to the reasonable regulatory conduct of the host states.<sup>253</sup> Therefore, the mutual promise of the contracting parties, to promote and protect investments within their territories, is intimately connected with the behaviour in which the states treat and regulate the investments and investors in question. That is to say, even though these kinds of international obligations are mainly governed by principles of international law, it cannot be denied that the performance of these international obligations (in

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<sup>248</sup> See Dolzer and Schreuer, *supra* note 103, pages 124-125.

<sup>249</sup> See Sornarajah, *supra* note 7, on page 116.

<sup>250</sup> *Ibid.*, pages 332-334.

<sup>251</sup> *Ibid.*, on page 236. See also Dolzer and Schreuer, *supra* note 103, on page 124; Reinisch, *supra* note 245, on page 111; and Montt, *supra* note 6, on page 108.

<sup>252</sup> See, e.g., Klager, *supra* note 240. CMS v. Argentina (2005), *supra* note 244; Tecmed v. Mexico (2003), *supra* note 242; Metalclad Corporation v. Estados Unidos Mexicanos (ICSID Case No. ARB (AF)/97/1) August 30, 2000 – Final Award; Azurix Corp. v. la Republica Argentina (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award; and MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile (ICSID Case No. ARB/01/7) May 25, 2004 – Final Award.

<sup>253</sup> See Montt, *supra* note 7, on page 299.

particular this FET standard) should also be based on the principles of domestic administrative law relevant to each contracting party's regulatory conduct.

It is at this point that the main concern arises as to when it is necessary to determine the equilibrium between the interpretation of the reasonable regulatory behaviour of a state, in accordance with the notion of fair and equitable treatment at the international level, and the notion of fair and equitable treatment at the national level, i.e., the interpretation of this investment law principle in accordance with the principle of legality and other related principles of administrative law.

Within this context, it has been said that it seems like 'notions of fairness and equity remain too malleable and chameleon-like to be useful, and could lend themselves to mischief, at least from the host state's perspective'.<sup>254</sup> For this reason, the evolution of this principle, along with some of the principles of domestic administrative law, should be taken into consideration in order to mitigate the previous perception. Accordingly, this exercise can help the development of the notion of fair and equitable treatment, as it has already been stated that '[the application of] the whole body of principles of administrative review into the arbitration of investment disputes through the fair and equitable standard is a visible factor'.<sup>255</sup>

## ii. National treatment

The national treatment principle represents the mutual and pre-entry-phase international commitment of the contracting parties to refrain from giving investors (from the other party) within their territory less favourable treatment from that given to the host state's

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<sup>254</sup> W. W. Park, *Arbitrability and Tax*, in *Arbitrability: International & Comparative Perspectives*, 179-205, Kluwer Law International, Netherlands (2009) <[http://www.arbitration-icca.org/media/0/12409314487590/tax\\_and\\_arbitration\\_w\\_w\\_park.pdf](http://www.arbitration-icca.org/media/0/12409314487590/tax_and_arbitration_w_w_park.pdf)> (Last visit 26/05/2011), on page 192.

<sup>255</sup> See Sornarajah, *supra* note 7, on page 341.

national investors and their profits.<sup>256</sup> The purpose of this standard is ‘to create a level playing field between foreign and domestic investors in the relevant market.’<sup>257</sup>

This obligation has also been assimilated into the Calvo Doctrine<sup>258</sup> which states that ‘aliens who establish in a country are entitled to the same rights of protection enjoyed by nationals; they cannot expect to have extended protection’.<sup>259</sup>

However, it has been said that ‘the exact scope and application of national treatment varies from one IIA to another’.<sup>260</sup> Indeed, due to widespread knowledge of this obligation and the dynamic practice of the BITs, it has been said that ‘the concrete jurisprudence... may end up posing a serious threat to developing countries’ sovereignty and independence [i.e., the majority of host states]’.<sup>261</sup> Similarly, it has been argued that this threat may also ‘lead to either equality or inequality [between the contracting states]’.<sup>262</sup>

On the other hand, the interpretation of this international obligation may also depend on economic or legal perspectives. These perspectives provide a group of sub-obligations such as (i) the equality of competitive opportunities; and (ii) the equality before the law.<sup>263</sup>

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<sup>256</sup> See, e.g., Article 4 (1) of the Colombia-Peru BIT; Article 3 (1) of the Venezuela-Belarus BIT and of the Venezuela-Barbados BIT; Article 2 (1) of the USA-Argentina BIT; of the USA-Ecuador BIT, and of the USA-Panama BIT.

<sup>257</sup> UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIT/2006/5, February 2007 < [http://www.unctad.org/en/docs/iteiia20065\\_en.pdf](http://www.unctad.org/en/docs/iteiia20065_en.pdf) > (Last visit 25/06/2011), on page 33.

<sup>258</sup> For a detail analysis and comparison of the notions of national treatment and the Calvo Doctrine, see Montt, *supra* note 3, pages 35-82; and Brownlie, *supra* note 21, on page 545.

<sup>259</sup> Carlos Calvo, 3 *Le Droit International Teorique et Practique; Precede d'un Expose Historique Des Progres de la Science du Droit des Gens*, (5<sup>th</sup> edition, Paris, Arthur Rousseau, 1896); quoted by Montt, *supra* note 7, on page 40. See also Sornarajah, *supra* note 7, on page 141.

<sup>260</sup> See Newcombe and Paradell, *supra* note 104, on page 151; and Brownlie, *supra* note 21, on page 525.

<sup>261</sup> See Montt, *supra* note 7, on page 75.

<sup>262</sup> *Ibid.*, on page 75. See also Brownlie, *supra* note 21, on page 524.

<sup>263</sup> See Newcombe and Paradell, *supra* note 104, on page 151; and Sornarajah, *supra* note 7, on page 235.

Furthermore, it has been said that the task of identifying these obligations and sub-obligations is based on four ‘central elements of national treatment’.<sup>264</sup> That is to say, they are based on (i) the non-discrimination between foreigners and nationals; (ii) ‘the applicable subjects must be in like situations’; (iii) the same legal status for both the businesses of foreign investors and domestic investors; and (iv) the unsettled legal nature of the national treatment.<sup>265</sup>

Finally, the last central element regarding the unsettled legal nature of national treatment may be associated with the idea that ‘the BIT network must achieve an acceptable equilibrium between investments and the public interest’.<sup>266</sup> For this purpose, upgrading the Calvo Doctrine through the introduction of the notion of national treatment as the ‘BIT-as-developed-countries-constitutional law-and-no-more [clause]’ has been proposed.<sup>267</sup> In other words, the definition of this standard of treatment must take into account the notion of equality under the domestic law of developed nations in order to avoid the application of a higher standard than that granted by the home state to its own nationals.<sup>268</sup>

### iii. Most-favoured-nation treatment

The scope of this international obligation (MFN treatment) is very similar and comparable to the notion of national treatment.<sup>269</sup> In fact, they both apply the same foundations, but this MFN treatment includes the standard given to third-state

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<sup>264</sup> Based on the Organization of Economic Co-operation and Development’s (OECD) definition of national treatment in the 1976 Declaration on International Investment and Multilateral Enterprises; quoted by Newcombe and Paradell, *supra* note 104, on page 155.

<sup>265</sup> *Ibid.*, on page 155.

<sup>266</sup> See Montt, *supra* note 7, on page 77.

<sup>267</sup> To see more details about the proposal, see Montt, *supra* note 7, pages 74-80.

<sup>268</sup> See Brownlie, *supra* note 21, on page 525; and Sornarajah, *supra* note 7, on page 140.

<sup>269</sup> See Reinisch, *supra* note 245, on page 60.

nationals’.<sup>270</sup> This obligation represents the mutual commitment of the contracting parties to abstain from treating investors belonging to other contracting parties less favourably than those from a third state, its national investors and their profits.<sup>271</sup> It has been said that the main purpose of this standard is to ensure that ‘there is equality of competitive opportunities between investors and investments from different states’.<sup>272</sup>

Despite the above-mentioned similarity between national treatment and MFN treatment, some differences have been pointed out.<sup>273</sup> For example, the notion of national treatment implies (i) the application of the most favourable state measures adopted by the host state to the benefit of local investors and foreign investors; and (ii) the recognition that some protectionist state measures do not benefit some foreign investors (i.e., ‘reserve’ or ‘*publicatio*’<sup>274</sup>) (an exception to the sub-obligation of equality in competitive opportunities).<sup>275</sup>

Conversely, the MFN treatment, as a relative standard, infers a necessity on the part of a foreign investor to compare and scrutinise domestic measures that have been adopted by the host state in order to identify those different standards that may benefit nationals of a third state.<sup>276</sup> This has been referred to as the process of ‘borrowing treaty provisions from other treaties’.<sup>277</sup>

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<sup>270</sup> It has been said the origin of this standard goes back to the old Friendship, Commerce and Navigation (FCN) treaties from the nineteenth century. See Sornarajah, *supra* note 7, on page 236.

<sup>271</sup> See, e.g., Article 3 (1) of the Venezuela-Vietnam BIT; of the Venezuela-Belarus BIT; and the Venezuela-Barbados BIT; Article 2 (1) of the USA-Argentina BIT; of the USA-Ecuador BIT; and of the USA-Panama BIT; Article 4 (1) of the Colombia-Peru BIT; Article 4 (3) of the Colombia-Switzerland; Article 4 (1) of the Colombia-UK BIT and the Colombia-Cuba BIT; Article 3 (1) of the Colombia-Spain BIT; and Article 4 (2) of the Colombia-Chile BIT.

<sup>272</sup> United Nations Conference on Trade and Development (UNCTAD), *Most-Favoured-Nation Treatment*, UNCTAD Series on issues in international agreements (New York and Geneva; United Nations, 1999) (UNCTAD/ITE/IIT/10)[UNCTAD, *MFN Treatment*] at 8; quoted by Newcombe and Paradell, *supra* note 104, on page 193.

<sup>273</sup> *Ibid.*, pages 224-225.

<sup>274</sup> See points v and vi of sub-section b of chapter II.

<sup>275</sup> See Newcombe and Paradell, *supra* note 104, on page 224.

<sup>276</sup> See Dolzer and Schreuer, *supra* note 103, on page 186; McLachlan, Shore and Weiniger, *supra* note 124, on page 254; and, Newcombe and Paradell, *supra* note 104, on page 225.

<sup>277</sup> See Reinisch, *supra* note 245, on page 64.

Concerning this latter point, the inclusion of this type of treatment into BIT provisions represents the necessity of considering whether or not such ‘borrowing treaty provisions’ is suitable for the context of other treaties. As it has been said, it can be ‘a potent ratchet by which obligations assumed or concessions made in negotiations may raise the stakes in the obligations of the host state under the BIT in question’.<sup>278</sup>

Finally, the application of this standard to private individuals of a state that is not party to a given BIT, can be a ‘ruling point’ for the contracting states due to the simple reason that the third state neither expressly participated nor agreed – in written form – to be bound by the treaty in question.<sup>279</sup> In order to support this latter idea, consideration of the international principle regarding the legal equality of the contracting states should be taken into account. This principle is enshrined in article 34 of the Vienna Convention and expressly states that ‘a treaty does not create either obligations or rights for a third State without its consent’.

#### iv. Full protection and security treatment

The scope of this treatment has been constantly evolving, i.e., from a physical protection to legal protection of foreign investments.<sup>280</sup> Similarly, it has been said that ‘the drafting of [this] clause varies widely’.<sup>281</sup> Following this concept, in practice, two basic clauses related to the scope of this treatment can be found.

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<sup>278</sup> See McLachlan, Shore and Weiniger, *supra* note 124, on page 254; and Dolzer and Schreuer, *supra* note 103, on page 187.

<sup>279</sup> Articles 35 of the Vienna Convention. See also Reuter, *supra* note 39, on page 25.

<sup>280</sup> See Cordero Moss, G., *Full Protection and Security* in Reinisch, *supra* note 245, on page 131. See also Dolzer and Schreuer, *supra* note 103, on page 149.

<sup>281</sup> This variation ranges from ‘protection’; to ‘full protection’; ‘protection and security’; ‘full protection and security’; ‘full physical security and protection’; ‘adequate protection and security’; ‘full and constant protection and security’; ‘complete and adequate protection and security’; ‘constant protection and security’; ‘the most constant protection and security’. For more details and explanations about this variation see Newcombe and Paradell, *supra* note 104, on page 308; and Reinisch, *supra* note 245, on page 132.



The first basic clause is contained within the majority of BITs. It establishes the full protection and security of foreign investment within the territory of the other contracting party.<sup>282</sup> The second basic clause is a rare case within the BIT network. It establishes ‘full protection and *legal security*’.<sup>283</sup> (Emphasis added).

Regarding these two clauses, it is also necessary to point out that they may be located in the same article and even in the same paragraph of the fair and equitable treatment principle. This two-in-one-standard article has given rise to different interpretations of these two standards.

In this respect, despite the fact that this standard is scarcely applied, there has been a debate on ‘a possible emerging consensus’ with regard to the scope of this obligation. This debate has been centred on (i) whether it is only limited to physical protection or whether it goes beyond this type of protection.<sup>284</sup> With regard to the second broader point, it has been discussed (ii) whether or not this treatment overlaps with other standards or whether it is already incorporated into the scope of fair and equitable treatment or into the scope of the umbrella clause.<sup>285</sup>

In any case, either under the physical protection approach or under the legal protection approach, or possibly under both approaches, it is of paramount importance to bear in mind that this international standard of protection and security of foreign investments is conceived to be the general provision and obligation that has been mutually consented to by the contracting parties (i.e., public law subjects). Hence, there should not be any

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<sup>282</sup> See, e.g., article 2 (2) of the Venezuela-Vietnam BIT, of the Venezuela-Belarus BIT and of the Venezuela-Barbados BIT; see also article 2 (2) a) of the USA-Argentina BIT; article 2 (3) (a) of the USA-Ecuador BIT; article 2 (2) of the USA-Panama BIT; article 3 (1) of the Colombia-Peru BIT and Colombia-UK BIT; and, article 2 (3) of the Colombia-Spain BIT.

<sup>283</sup> See Article 4 (1) of the Argentina- Germany BIT (1991), quoted by Newcombe and Paradell, *supra* note 104, on page 308. See also Reinisch, *supra* note 245, on page 133.

<sup>284</sup> See Reinisch, *supra* note 245, on page 131.

<sup>285</sup> *Id.*, pages 131-150. See also Dolzer and Schreuer, *supra* note 103, on page 149.

doubt about the coexistence of this principle with principles of administrative law, such as the principle of legality, the principle of the administration's discretionary power, the principle of proportionality, the principle of equality before the law, and the principle of the public administration's good faith (see Chapters II and V).

Finally, attention must be given to the fact that, according to the principle of legality (recognized by all legal systems), the performance of this standard of protection and security within the territory of a host state is a priority governed by principles of domestic administrative law. In other words, it is this specialized branch of domestic public law that is in charge of delimiting or controlling the host state's regulatory power. It is this regulatory power that, finally, may or may not affect the foreign investors' interests.

v. Access to justice, fair procedure, and denial of justice.

This standard has been introduced through article 5 (2) (a) of 2004 USA Model BIT which expressly states that the “the fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world...’. In practice, this treatment was textually adopted by the USA-Uruguay BIT in 2005.

One of the main reasons for incorporating this standard into the BIT network is to guarantee what has been called the ‘three stages of the judicial process’.<sup>286</sup> These are: (i) the right to bring a claim, (ii) the right of both parties to fair treatment during the

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<sup>286</sup> See Dolzer and Schreuer, *supra* note 103, on page 163.

proceedings, and (iii) the right to an appropriate decision at the end of the process.<sup>287</sup> This judicial process also applies to actions of all branches of a government.<sup>288</sup> Additionally, it is argued that this standard is also incorporated as a tacit element of the standards of fair and equitable and the full protection and security of foreign investors.<sup>289</sup>

Unlike the substantive side of this principle, the incorporation of this obligation is proof of the procedural side of the concept of the minimum standard of international law, i.e., what has been known as the procedural minimum standards.<sup>290</sup> Furthermore, such incorporation has been interpreted as a mechanism to vindicate and enforce the investor's rights before the maladministration of justice with regard to a foreign investor.<sup>291</sup>

Nevertheless, as part of the notion of fair and equitable treatment within the legal system of a given state, it is important to point out that the standard at issue should also be connected to one of the fundamental objectives of a democratic state, i.e., the guarantee of administering justice. This objective is also connected with one of the most popular constitutional principles of any legal system which is the *right to defence*.

This constitutional right is connected with the guarantee of having a transparent judicial process. Further to this, one of the most important administrative law principles to guarantee this process of defence is the *principle of the duty to give reasons*. In other words, this refers to the reaffirmation of the well-known legal principle of 'due

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<sup>287</sup> Ibid., on page 163.

<sup>288</sup> See, e.g., *Petrobart v The Kyrgyz Republic*, Award, 29 March, pp. 75-77; quoted by Dolzer and Schreuer, supra note 103, on page 162.

<sup>289</sup> See Dolzer and Schreuer, supra note 103, on page 162; and Reinisch, supra note 245, pages 119-120.

<sup>290</sup> See, e.g., *Ambatielos Claim*, 6 March 1956 (*Greece v United Kingdom*) 23 ILR 306, 325; quoted by See Dolzer and Schreuer, supra note 103, pages 163-164.

<sup>291</sup> See Reinisch, supra note 245, pages 119-120.

process'. This principle represents a fundamental pillar within the host state machinery of administering justice.

Furthermore, it is important to emphasize that it has been argued that, within the judicial system of a state, the arbitration mechanism has been conceived to be an alternative and amicable mechanism to settle disputes which does not escape the application of the principle of due process.<sup>292</sup>

#### vi. Transfer of Funds

The obligation of allowing a free transfer of funds in or out of a given host state is also included within BIT provisions. These treaties assume the obligation of ensuring that all transfers related to a given foreign investment can be done freely and without delay into and out of the host state (i.e., the main objective of all foreign investments).<sup>293</sup>

For example, most of the BITs establish this obligation, more or less, under the same premises, i.e., 'each contracting party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory'.<sup>294</sup>

With regard to this obligation, an enumeration of the transactions that it covers are given.<sup>295</sup> For example, it refers to (i) returns; (ii) compensation; (iii) payments arising out of an investment dispute; (iv) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan

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<sup>292</sup> In this context, it has been said that 'an investment tribunal will not act as an appeals mechanism'; see Dolzer and Schreuer, *supra* note 103, on page 165.

<sup>293</sup> See Sornarajah, *supra* note 7, on page 238.

<sup>294</sup> See, e.g., article 6 of the Venezuela-Vietnam BIT, of the Venezuela-Belarus BIT and of the Venezuela-Barbados BIT; article 5 (1) of the USA-Argentina BIT; article 4 (1) of the USA-Ecuador BIT; article 5 (1) of the Colombia-Peru BIT and of the Colombia-Switzerland BIT; article 7 of the Colombia-UK BIT; and, article 6 of the Colombia-Spain BIT.

<sup>295</sup> See, e.g., article 6 of the Venezuela-Vietnam BIT, of the Venezuela-Belarus BIT and of the Venezuela-Barbados BIT; article 5 (1) of the USA-Argentina BIT; article 4 (1) of the USA-Ecuador BIT; article 5 (1) of the Colombia-Peru BIT and of the Colombia-Switzerland BIT; article 7 of the Colombia-UK BIT; and, article 6 of the Colombia-Spain BIT.

agreement directly related to an investment; (v) proceeds from sale or liquidation of all or any part of an investment; and (vi) additional contributions to capital for the maintenance or development of an investment.

With regard to this obligation, as a part of the minimum standards of treatment, it is important to point out that the right to repatriate funds can be limited as part of the ‘monetary sovereignty’<sup>296</sup> of the host state (i.e., the right to control and regulate its own currency).<sup>297</sup> This limitation can vary from one treaty to another.<sup>298</sup> Such a limitation is mainly based on the restriction of the right to transfer funds during periods of financial crisis.<sup>299</sup> This limitation has also been recognized globally through international monetary, trade and investment law.<sup>300</sup>

Notwithstanding , it has also been said that ‘if transfer restrictions are so severe that the funds are frozen within the host state for an extended period, the transfer restrictions might be expropriatory’.<sup>301</sup> This may lead to the question of whether this freezing measure has been taken on grounds of a general public interest policy of the host state or if it has been an isolated measure.

In both cases, it may be a necessity to consider this obligation on a case-by-case basis rather than based on a general assumption. This may also take into consideration the possibility that the host state has to argue the clause of *rebus sic stantibus* (things thus

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<sup>296</sup> See Dolzer and Schreuer, supra note 103, on page 192; Newcombe and Paradell, supra note 104, on page 400; and, Sornarajah, supra note 7, on page 216.

<sup>297</sup> See Peter, supra note 147, on page 29; and Sornarajah, supra note 7, on page 216.

<sup>298</sup> See Sornarajah, supra note 7, on page 239.

<sup>299</sup> See Dolzer and Schreuer, supra note 103, on page 193; and Newcombe and Paradell, supra note 104, on page 400.

<sup>300</sup> For a more extensive explanation of this issue; see Newcombe and Paradell, supra note 104, pages 400-417. See also Peter, supra note 147, pages 29-31; and see Sornarajah, supra note 7, on page 238.

<sup>301</sup> See Newcombe and Paradell, supra note 104, on page 400.

standing) due to the circumstances that have arisen, making it impossible to guarantee an absolute right to repatriate funds.<sup>302</sup>

#### vii. Expropriation<sup>303</sup>

The idea of what constitutes an expropriatory measure has been an object of discussion at the international level for the last few decades.<sup>304</sup> The regulation of this state action was originally created and governed by principles of domestic public law through direct expropriation as an institution of public law.<sup>305</sup> Nonetheless, during this time, the idea of assimilating and considering some state regulatory measures as tantamount to expropriation, i.e., indirect expropriation, has arisen.<sup>306</sup>

Despite the variation of wording from one BIT to another, modern BITs model the clause that regulates to expropriation at the international level as follows:

Investments shall not be expropriated or nationalized either *directly* or *indirectly through measures tantamount to expropriation or nationalization* ('expropriation') *except for a public purpose; in a non discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process law and the general principles of treatment...*<sup>307</sup> (Emphasis added).

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<sup>302</sup> See Sornarajah, supra note 7, on page 239.

<sup>303</sup> When the author refers to expropriation, he is referring to expropriation with due compensation. If this were not the case, the author would refer to confiscation which is beyond the scope of this research.

<sup>304</sup> See Reinisch, supra note 245, on page 151.

<sup>305</sup> See, e.g., Ley de Expropiación por Causa de Utilidad Pública o Social (2002) – Venezuela.

<sup>306</sup> See, for further explanation, A. K. Hoffmann, *Indirect Expropriation*, in Reinisch, supra note 245, pages 151-170.

<sup>307</sup> See, e.g., article 4 (1) of the Venezuela-Belarus BIT, the Colombia-Chile BIT, the USA-Argentina BIT, the Colombia- Spain BIT, and the USA-Panama BIT; article 5 (1) of the Venezuela-Barbados BIT; article 3 (1) of the USA-Ecuador BIT; article 7 of the Colombia-Peru BIT and Colombia-Cuba BIT; and article 6 of the Colombia-Switzerland BIT.

With regard to the context of this clause, it has been said that this type of clause ‘refer[s] to three types of taking of foreign property: [i] direct; [ii] indirect and [iii] anything “tantamount to a taking” or anything “equivalent to a taking”’.<sup>308</sup>

Similarly, it has been pointed out that this clause has been influenced by the content of article 11 of the NAFTA, in relation to which it has been stated that ‘[t] the NAFTA litigation has certainly caused some concerns as to whether investment protection has gone too far.’<sup>309</sup>

This expropriation clause also establishes four prerequisites that must be fulfilled cumulatively in order to consider a governmental expropriatory measure as lawful conduct.<sup>310</sup> That is to say, the governmental measure must be taken: (i) for a public purpose; (ii) in a non discriminatory manner; (iii) upon prompt, adequate and effective compensation;<sup>311</sup> and (iv) in accordance with legal due process.

Despite the diverse academic discussions on the distinction of various types of expropriation as general, small-scale, lawful, unlawful, *de facto*, disguised, consequential, creeping, and regulatory expropriations,<sup>312</sup> the main concern arises when the standard at issue raises the necessity of distinguishing between the two main types of expropriations, e.g., direct expropriation and indirect expropriation.<sup>313</sup>

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<sup>308</sup> See Sornarajah, *supra* note 7, on page 344.

<sup>309</sup> *Ibid.*, on pages 288 and 313.

<sup>310</sup> See Dolzer and Schreuer, *supra* note 103, on page 91.

<sup>311</sup> With regard to this element, it has been said that the unlawful or lawful nature of the state’s expropriatory conduct could be determined, i.e., an expropriatory conduct will be considered lawful if an adequate amount of compensation has not been provided for. See, e.g., Brownlie, *supra* note 21, on page 539.

<sup>312</sup> *Ibid.*, on page 539.

<sup>313</sup> See, e.g., Newcombe and Paradell, *supra* note 104, pages 322-328; Dolzer and Schreuer, *supra* note 103, pages 92-118; Brownlie, *supra* note 21, on page 532; Reinisch, *supra* note 245, on page 152; McLachlan, Shore and Weiniger, *supra* note 124, pages 290-297; Van Harten, *supra* note 2, pages 90-93; and Subedi, *supra* note 3, pages 74-75.

In this regard, direct expropriation has been understood as ‘direct forms of expropriation in which the state [legally,] openly and deliberately seizes property, and/or transfers title of private property to itself or a state-mandated third party.’<sup>314</sup>

Conversely, indirect or creeping expropriation has been conceived as ‘indirect forms of expropriation in which a government measure, although not on its face affecting a transfer of property, results in the foreign investor being deprived of its property or its benefits.’<sup>315</sup>

Within this context, it is important to highlight that the former type of expropriation does not represent an immense concern since it represents an objective, limited, justified, legal and specified state measure. Direct expropriation is primarily undertaken in accordance with the principles of domestic public law. In particular, it is based on the principles of legality, opportunity and the administration’s discretionary power. Nonetheless, it is also important to point out that in the case of direct expropriation an international problem arises if an agreement between the host state and the foreign investor on the amount of compensation has not been reached.

However, indirect expropriation does represent the most important legal concern at a national and international level; since it is a difficult task to determine when a government measure can be considered to amount to expropriation<sup>316</sup> (i.e., the conflict between the notion of indirect expropriation and a state’s right to regulate<sup>317</sup>). In the last years, international arbitrators have been entrusted with carrying out this task in accordance with the obligations contained within a given BIT and with principles of international law.

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<sup>314</sup> See Newcombe and Paradell, *supra* note 104, on page 323.

<sup>315</sup> *Ibid.*, on page 323.

<sup>316</sup> *Ibid.*, on page 322.

<sup>317</sup> See for details Reinisch, *supra* note 245, pages 165-166.



Similarly, it is important to stress that the determination of what constitutes a direct expropriation, or what constitutes indirect or creeping expropriation, should be primarily undertaken in accordance with the principles of domestic administrative law, particularly if regulatory disputes are at stake. As, at the end of the day, these principles are the legal foundations of the state's regulatory conduct as well as its national independence and its economic development.<sup>318</sup>

Obviously, this exercise represents *a priori* a legal and doctrinal conflict between those principles of international investment law and those principles of domestic administrative law when regulatory disputes are taken into consideration. Nevertheless, in any case, the discovery of a common ground between these two potential conflicting issues is part of the main objective of this research.

#### **e. Summary**

International investment treaties are legal instruments of public law. They are concluded by sovereign contracting states through the exercise of their public capacity. They should also be considered to be contracts of public interest. Similarly, the public law nature of BITs also finds support in the public-law subject-matter of these public law instruments which formalize the reciprocal intentions of the contracting states to promote economic cooperation to their reciprocal benefit.

Furthermore, the commitment of the contracting parties, the acquisition of mutual international obligations (standards of treatment) and the performance of these obligations are embodied within this type public law document. Similarly, it is

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<sup>318</sup> See Brownlie, *supra* note 21, pages 533-534.

important to highlight that the regulatory power of the contracting states may not be relinquished by their subscription to these types of public law instruments.

Additionally, the contracting states, the document (i.e., the BIT), and the mutually agreed international obligations, including the chosen mechanism to resolve potential disputes, should be subject to principles of public international law and to some principles of domestic administrative law when the administrative action of the host state needs to be reviewed by investment arbitrators at the international level.

The application of public international law does not exclude the application of the principles of domestic administrative law, being the principles that govern the regulatory behaviour of the contracting states. This is especially the case if it is accepted that there are two types of public law relationships within international investment arbitration, i.e., the primary relationship between the contracting parties (contractual relationship) and the secondary relationship between the host state and nationals of the other contracting party (primarily a regulatory relationship).

Finally, the question which now must be asked concerns the (i) the legal nature of treaty-based investor-state arbitration as a mechanism to adjudicate regulatory issues in accordance with the scope of international obligations; and (ii) the application of some principles of administrative law to international regulatory disputes through the application of the FET standard. These questions involve essential public law elements with regard to the sovereign right of the state to regulate national economic activities on grounds of its public interest, and the determination of a host state's international responsibility for the possible breach of international (investment) obligations. This issue will be addressed in detail in the next chapters.

## CHAPTER IV

### INVESTOR-STATE TREATY ARBITRATIONS – PUBLIC LAW ADJUDICATORY MECHANISMS

#### a. Introduction

Investment treaty-based controversies between private individuals (e.g., foreign investors) and sovereign states – at the international level – are a relatively new phenomenon within the classic notion of public international law.<sup>1</sup> Nonetheless, it is noteworthy to mention here that analogous legal disputes between host states and private individuals – at the national level – are not a novel concept in public domestic law. In fact, this practice of private individuals bringing actions against the state through its public administration has existed within the major legal systems of the world for over seventy-five years.<sup>2</sup> Perhaps, due to this reason, it has been argued that the scope of these new investor-state controversies originally fell within the competence of national courts and therefore they may be in conflict with the competence of the courts.<sup>3</sup>

The international relationship between a host state and a foreign investor is mainly created by and based on the parameters and provisions established by a certain IIT, as

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<sup>1</sup> See B. Kingsbury, and S. W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 75.

<sup>2</sup> This administrative law practice goes back to 1873, when the famous Blanco case was rendered on 8 February 1873 by a French Tribunal. This case concerns a conflict that arose from determining the competent court (i.e., civil or administrative) to evaluate the claim made for damages caused to a child (Agnes Blanco) by a wagon. The conflict tribunal held that the damages were caused as a consequence of carrying out public services activities and for this reason the competent court was the administrative court. See L. Neville Brown, and J. Bell, *French Administrative Law* (Fifth Edition, Oxford University Press, UK 2003), on page 129.

<sup>3</sup> See, e.g., A. Sheppard, and M. Hunter, *Introduction: An Overview of the Relationship Between Courts and Investment Treaty Arbitration* in F. Ortino, A. Sheppard, and H. Warner, *Investment Treaty Law – Current Issues Volume 1* (British Institute of International and Comparative Law, London 2006), pages 153-172; and A. G. Adaralegbe, *Concurrent Jurisdiction Between Treaty and Domestic Tribunals: An Examination of Jurisdiction-Regulating Mechanisms Within the Investor-State Treaty Arbitration System and Their Effectiveness* (CEPMLP, University of Dundee, PhD Thesis, 2009).

was emphasized in Chapter III. It is within these parameters and provisions where the incorporation of a non-classic public international law element can be found. That is to say, the incorporation of a private individual's rights to sue sovereign states before *ad hoc* international tribunals, into the contemporary notion of public international law. This private right compromises the privilege belonging to private individuals to take legal action against a sovereign state – at the international level – for the breach of an IIT's provisions. The direct beneficiary of this right is the national of the other contracting party to a BIT, who is defined as 'a foreign investor'.<sup>4</sup>

This right of a foreign investor is mainly guaranteed and protected by various alternative mechanisms that range from consultation to arbitration (see Chapter III). This protection is mainly activated when the foreign investor has decided to carry out an investment in a certain host state and this host state breaches a given BIT provision in the performance of its domestic regulatory conduct.

Among the alternative mechanisms in place to resolve legal disputes, there is a main mechanism which is used to try and resolve a disagreement arising from a particular BIT. This particular mechanism is known as *investor-state treaty-based arbitration*.

Curiously, the protection and exercise of this contemporary public international law right, its consequences and proceedings have been considered to be analogous mostly to those elements derived from regulatory controversies between the public administration and its citizens.<sup>5</sup> That is to say, this latter relationship has been protected

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<sup>4</sup> For a comprehensive explanation of the terms 'investment' and 'foreign investor' see, e.g., *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award.

<sup>5</sup> *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion. See also G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, Oxford University Press, UK 2007); and, G. Van Harten, and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, EJIL (2006) Vol. 17 No. 1, pages 121-150.

by equivalent domestic legal remedies such as the administrative and judicial review of acts derived from the governmental conduct of a host state. It has been said that investor-state treaty-based arbitrations (particularly regarding the review of regulatory issues at the international level) are a kind of an ‘international judicial review’<sup>6</sup> and for this reason; this type of arbitration should be considered to be analogous to the functions of national (administrative) tribunals and courts.<sup>7</sup>

With regard to these analogies, it could prove difficult for investment arbitrators to easily determine the scope of these analogies with clarity. This difficulty may also be of particular relevance when there is a need to take into consideration the argument which states that the rules governing the regulatory conduct of the host state have not yet been codified, either internationally or nationally.<sup>8</sup>

A similar concern arises for investment arbitrators if there emerges the need to deal with the variation between the protection of commercial acts (i.e., those acts that may include *Acta Jure Gestionis*) and investments acts (i.e., those acts that may include *Acta Jure Imperii*). The potential problem is that this exercise may include the sensitive task of judging investment acts, considered as the types of act that involve acts of state sovereignty, such as acts deriving from the use of a state’s regulatory power and acts concerning its public interest. This area traditionally has been reserved for the jurisdiction of domestic courts.

Consequently, these acts of state may require consideration of the application of some principles of (constitutional and administrative) law when judging regulatory issues at the international level. In simple terms, the review of these acts require the application

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<sup>6</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 5, on paragraph 13.

<sup>7</sup> *Ibid.* See also *Van Harten and Loughlin*, *supra* note 5; and *Van Harten*, *supra* note 5.

<sup>8</sup> See, e.g., *Mobil Corporation et al v. Bolivarian Republic of Venezuela* (ICSID Case ARB/07/27) June 10, 2010 – Decision on Jurisdiction, on paragraph 87.

of domestic legal principles that have been taken into consideration by national tribunals or courts when responding to a similar regulatory situation as that being dealt with in ISTA.

As was mentioned in Chapter III, this colossal job can be even more difficult if investment arbitrators need to take into account aspects such as the increasing influence of domestic legal principles upon international law which has not been previously experienced, and the lack of expertise on the part of some international lawyers to deal with these domestic tools.<sup>9</sup>

It has recently been asserted that: '[t]he cure [to the ongoing investment arbitration problems] would seem to lie in the administrative [law] culture'.<sup>10</sup> This is true, in particular, if the current practice of investment arbitrators dealing with regulatory disputes at the international level is taken into consideration. Hence, the fact that all investment arbitrators act as international judges and the fact that their roles may be contributing to the argued uncertain future of the investment legal system should be taken into account.<sup>11</sup>

This chapter is directed towards emphasizing the public law nature of this treaty-based mechanism and, subsequently, providing basic ideas and tools that investment arbitrators can use as legal references in legal situations similar to those that have already taken place within the major domestic legal systems of the world over the last fifty-five years. In addition to this, this chapter will highlight the main similarities

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<sup>9</sup> See A. M. Slaughter, and S. R. Ratner, *Appraising The Methods of International Law: A prospectus for Readers* 36 *Stud. Transnat'l Legal Pol'y* 1 (2004), on page 19; T. Wälde, *Review of the Book on Investment Treaty Arbitration and Public Law by Van Harten, G.*, (Unpublished); and W. Burke-White, and A. Von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 712.

<sup>10</sup> See Neville Brown and Bell, *supra* note 2, on page 302.

<sup>11</sup> See T. W. Wälde, "Equality of Arms" in *Investment Arbitration: Procedural Challenges in Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, USA, 2010), on page 162.

between ISTA and domestic mechanisms that are used to resolve regulatory disputes between the public administration and private individuals.

### **b. Investor-state treaty arbitrations**

The increase in IITs and the consequent explosion of treaty-based investor-state arbitrations as quasi-judicial methods which predominantly resolve regulatory disputes has constituted a new development in international investment law. The emergence of this practice has given rise – during the last two decades – to concerns and elemental questions from diverse sectors of society (see Chapter VI). These concerns and questions refer to the legal nature and functions of these international treaties and their quasi-judicial methods that mainly consider issues arising from regulatory disputes between a host state and nationals of the other contracting state. These elemental questions are developed in the following sub-section, based on the following premises:

- It has been said that this mechanism represents a derogation of the principle of state immunity from jurisdiction due to the submission and consent of the host state to arbitral tribunals that have been agreed within IIT provisions.<sup>12</sup> This is especially so if the original theory, stating that the conflicts between a given state (i.e., its public administration) and an individual are normally settled by the host state's national courts, is taken into account.
- The main difference between this expanding system of solving investor-state disputes at the international level and the classic system solving state-individual disputes at the national level is related to the question of how international adjudicators deal with the notion of an 'unlawful', 'discriminatory' or

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<sup>12</sup> See, e.g., H. Rondon de Sanso, *Aspectos Jurídicos Fundamentales del Arbitraje Internacional de Inversión* (Editorial Ex libris, Caracas, 2010).

‘arbitrary’ regulatory measure of a host state.<sup>13</sup> In particular, it is relevant whether this alleged ‘unlawful’, ‘discriminatory’ or ‘arbitrary’ regulatory conduct was carried out by an act or omission of the host state, in accordance with its domestic law but in disagreement with international legal obligations consecrated within an IIT, particularly in the context of fair and equitable treatment.<sup>14</sup>

- Finally, there must be consideration of the fact that this expanding legal mechanism is argued to be a neutral and confident forum destined to guarantee impartial justice.<sup>15</sup>

Within the context of the above observations, it is opportune to analyze the main elements of ISTA as an adjudicatory public law mechanism in the following subsection.

#### i. Origin.

One of the origins of treaty-based investor-state arbitration can be found in Article 11 of the first modern investment treaty concluded by Germany and Pakistan in 1959. The main idea of this international agreement was to give rise to the creation of the individual’s private rights of action against sovereign states due to the lack of standing private individuals had in international law.<sup>16</sup> This right was created under the premise of providing private individuals with direct access to international tribunals in order to *protect* their rights and properties in accordance with the principles developed in

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<sup>13</sup> For a detailed study on the relevant distinction between the terms ‘arbitrary’ and ‘discriminatory’; see C. H. Schreuer, *Protection against Arbitrary or Discriminatory Measures* in C. Rogers, and R. Alford, The Future of Investment Arbitration (Oxford University Press, UK, 2009), pages 183-198.

<sup>14</sup> See S. Rosenne, Breach of Treaty (Grotius Publications Limited, Cambridge 1985), on page 49.

<sup>15</sup> See M. Sornarajah, The International Law of Foreign Investment (Second Edition, Cambridge University Press, UK 2004), on page 250.

<sup>16</sup> See Adaralegbe, *supra* note 3, on pages 2, 28-36.



customary international law.<sup>17</sup> This innovative arbitral mechanism was the result of the unsatisfactory method of resolving international investor-state disputes through diplomatic protection.<sup>18</sup> This was exemplified in the case filed by Belgium against Spain before International Court of Justice on September 15, 1958 (better known as the Barcelona Traction case, 1970).

Furthermore, there was a concern on increasing consideration for the treaty-based arbitration system as a quasi-judicial method which was more efficient and reliable at enforcing a private individual's rights compared to domestic legal courts.<sup>19</sup> This new arbitral practice was later followed by the ICSID Convention as was illustrated by early cases such as *Southern Pacific Properties (Middle East) Ltd v. Egypt* (1988) and *Asian Agricultural Products Ltd v. Sri Lanka* (1990). The International Centre for the Settlement of Investment Disputes (ICSID) was established in 1966.<sup>20</sup> This centre was created with the idea of building a neutral forum and facility to resolve disputes between contracting parties and private individuals.<sup>21</sup>

In addition, this right of a private individual was also created in accordance with the contracting state's consent which was manifested through their subscription to international investment agreements. Within the provisions of these agreements, there are mechanisms which have been incorporated to mainly resolve (i) disputes between

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<sup>17</sup> See Sornarajah, *supra* note 15, on page 10.

<sup>18</sup> See Sheppard and Hunter, *supra* note 3, on page 164; and I. Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, in S. W. Schill, International Investment Law and Comparative Public Law (Oxford University Press, UK 2010), on page 381.

<sup>19</sup> P. Moremen, 'Private Rights of Action to Enforce Rules of International Regimes' (2006) *Temp. L. Rev.*; quoted by Adaralegbe, *supra* note 3, on page 13.

<sup>20</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) Washington, 18 March 1965; 4 ILM 524; entered into force 14 October 1966.

<sup>21</sup> See C. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, The ICSID Convention – A Commentary (Second Edition, Cambridge University Press, UK, 2010), on page 1.

the contracting parties; and (ii) disputes between one of the contracting parties and nationals of the other contracting state for the breach of an IIT's provisions.<sup>22</sup>

Within this context, the consent of investors to submit themselves to these mechanisms of settling disputes is given after they sign such agreements. In fact, foreign investors do not exercise any 'direct' bargaining power at the moment of negotiating and concluding these investment treaties due to the already-mentioned lack of standing on the part of private individuals in international law.

A curious procedural fact that arose from the existence and functions of these treaty-based mechanisms to resolve disputes between a host state and individuals was their coexistence with the role of administrative bodies and/or national courts to protect individuals' rights.<sup>23</sup> In this respect, it has been stated that '[e]ach of these methods has national institutional counterparts which function in much the same way'.<sup>24</sup> Perhaps this is why it was stated that there could be concurrent jurisdiction between national courts and investment tribunals – specifically in relation to the protection of private individuals' rights that are under the same legal risk of violation.<sup>25</sup> For further explanation on this point, see sub-section vii) Analogy of ISTAs with some principles of domestic administrative law.

## ii. Definition

In relation to the definition of treaty-based investor-state arbitration, some essential elements of law need to be emphasized from the outset: firstly, the public-law nature of the contracting parties (e.g., sovereign states) and the private-law nature of foreign

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<sup>22</sup> See I. Brownlie, Principles of Public International Law (Seventh Edition, Oxford University Press, Oxford 2008), on page 608.

<sup>23</sup> See Adaralegbe, *supra* note 3, pages 2 and 28-36.

<sup>24</sup> See T. Buergenthal, and S. D. Murphy, Public International Law (Thomson West, USA, 1990), on page 67.

<sup>25</sup> See Adaralegbe, *supra* note 3, on page 1.

investors (e.g., private individuals, corporations); secondly, the public-law nature of the bilateral investment agreement (i.e., the BIT) derived from the legal nature of the contracting parties who are the main subjects of public law vis-à-vis sovereign states. This element includes the performance of the state's sovereign will which is exercised in their public law capacity; thirdly, the public-law nature of the subject-matter of these international treaties, since they are conceived to cover those aspects and areas related to the contracting parties' economic interests and public policy matters,<sup>26</sup> and, lastly, the express intention and consent of the contracting parties of, within treaty provisions, a clause related to the methods to resolve disputes between (i) contracting parties or (ii) one of the contracting parties and a national of the other contracting state. It is within this clause the contracting states create a list of mechanisms to resolve disputes in favour of, and at the decision of the other contracting party's investor.

For example, in the USA-Argentina BIT, article VII (2) establishes that:

[I]f the dispute cannot be settled amicably, *the national or company concerned may choose to submit* the dispute for resolution: (a) *to the courts or administrative tribunals* of the Party that is a party to the dispute; *or* (b) in accordance with any applicable, previously *agreed dispute-settlement procedures*; *or* (c) in accordance with terms of paragraph 3 [i.e., ICSID, UNCITRAL or any other arbitration institution]. (Emphasis added).

It is by virtue of this list of options that the contracting parties expressly consent to submitting to an international tribunal, i.e., to a treaty-based investment tribunal. This submission represents a limitation to the contracting states' immunity from jurisdiction. Such a list enumerates different legal mechanisms quoted above, i.e., conciliations, negotiations, national courts and international arbitrations as non-judicial, judicial and

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<sup>26</sup> See, e.g., *Mobil v. Venezuela* (2010), supra note 8.

<sup>26</sup> See *Slaughter*, supra note 9, on page 19.

quasi-judicial methods to deal with the possible breach of an IIT's provisions by a host state.

In this regard, it is important to highlight that, for whatever reason a dispute arises between a host state and a foreign investor, it will remain the same no matter which level or dispute resolution mechanism the investor selected (from the above-mentioned list) to address its claim. Furthermore, it is true to state that the contracting parties, at the moment of concluding a given IIT (which includes a clause for solving disputes), are aware of the fact that they are creating *a kind of temporary international forum* that will be in charge of dealing with a public-law matter and/or regulatory issues that are normally within the competence of national courts. Subsequently, the contracting states should be conscious of the fact that the creation of an international tribunal may result in a duty for international arbitrators to refer to principles of contemporary public international law in order to weigh up the state's regulatory behaviour at the international level.<sup>27</sup>

One articulation of treaty-based investor-state arbitration is found in article 24 (2) of the Free Trade Agreement of the Americas as:

A dispute between a Party and a national or company of the other Party arising out of or [i] *relating to an investment agreement* or [ii] *alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment*.<sup>28</sup> (Emphasis added).

From this definition, there are two main motives that can be distinguished which activate treaty-based arbitration. The first is derived from the breach of the provisions of the investment agreement as a whole, which includes issues of the investor's

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<sup>27</sup> See Adaralegbe, *supra* note 3, on page 5.

<sup>28</sup> Quoted by Doak Bishop, J. Crawford, and W. Michael Reisman, Foreign Investment Disputes – Cases, Materials and Commentary (Kluwer Law International, The Netherlands, 2005), on page 137.

contractual performance (i.e., a purely contractual dispute). For example, article 8 of the Venezuela-Belarus BIT advocates that ‘[a]ny dispute that derives directly from an investment agreement between a Contracting Party and an investor of the other contracting party [can be settled through arbitration]...’<sup>29</sup> (Emphasis added). The second motive results from the sole breach of those obligations created by the investment treaty’s provisions and their interpretation and application (i.e., a legal/regulatory dispute).<sup>30</sup> An example of this case can be found in article 11 of the Colombia-Switzerland BIT which establishes that ‘If an investor of one [contracting] Party considers that any measure applied by the other [contracting] party *is inconsistent with one obligation of this Agreement*, and this [measure] causes any damage or loss to him/her or to his/her investment, he/she can [opt for arbitration]’.<sup>31</sup> (Emphasis added).

In practice, treaty-based investor-state arbitration can either be related to both motives simultaneously or only related to one of the motives separately, as a mechanism to seek legal remedies under the IIT.<sup>32</sup> With the objective of keeping the scope of the present study limited, this research will focus on the second motive (i.e., legal/regulatory disputes). Treaty breach will be discussed in the following section.

### iii. Legal nature and purpose

Consideration of the nature and purpose of treaty-based investor-state arbitration has moved from purely economic aspects to legal grounds; and thence from economic-legal aspects to socio-economic considerations (including the consideration of issues arising from regulatory disputes). This legal shift has been expanding in a parallel manner

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<sup>29</sup> This article has been translated into English by the Author.

<sup>30</sup> See E. Fernandez Masia, Tribunales Nacionales, Arbitraje Internacional y Proteccion de Inversiones Extranjeras (Marcial Pons, Madrid, Barcelona, Buenos Aires, 2008), on page 49.

<sup>31</sup> Translated into English by the Author.

<sup>32</sup> See Sornarajah, *supra* note 15, on page 13.

along with the idea of considering '[i]nvestment treaty disputes [as] fundamentally contractual in nature'.<sup>33</sup> In this respect, and regarding the legal nature of this type of arbitration, it is important to draw attention to the following examples which provide three different reasons for a treaty-based state-investor dispute.

Firstly, there is a small group of treaties, such as the Bulgaria-China BIT<sup>34</sup> and the China-Bahrain BIT,<sup>35</sup> which establish, within their provisions and in their separate clauses, a mechanism to settle disputes between the host state and a given investor when they disagree on the amount of compensation (i.e., an economic dispute).

Secondly, there is a bigger group of treaties, such as the Venezuela-Barbados BIT,<sup>36</sup> the Colombia-Switzerland BIT;<sup>37</sup> and the Colombia-Spain BIT;<sup>38</sup> which provide for a mechanism to resolve investor-state disputes, but only when there is exclusively a breach of a treaty provision (i.e., a legal/regulatory dispute).

Finally, there is a much larger group of treaties, such as the Venezuela-Vietnam BIT;<sup>39</sup> the Venezuela-Belarus BIT;<sup>40</sup> the USA-Argentina BIT,<sup>41</sup> the USA-Ecuador BIT;<sup>42</sup> the Colombia-Peru BIT;<sup>43</sup> the Colombia-UK BIT,<sup>44</sup> and the Colombia-Chile BIT,<sup>45</sup> that stipulate the same dispute settlement mechanism but apply it when there has been a violation of an investment contract and of a treaty provision (i.e., a kind of a socio-economic dispute that could also involve the host state's national interest).

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<sup>33</sup> See Adaralegbe, *supra* note 3, on page 88.

<sup>34</sup> Article 9.

<sup>35</sup> Article 9 (3).

<sup>36</sup> Article 8.

<sup>37</sup> Article 11.

<sup>38</sup> Article 10.

<sup>39</sup> Article 8.

<sup>40</sup> Article 8.

<sup>41</sup> Article VII.

<sup>42</sup> Article VI.

<sup>43</sup> Article 12.

<sup>44</sup> Article 10.

<sup>45</sup> Article IX.

Under any of these three scenarios, two main players can be identified: e.g., a public-law subject (i.e., the host state) and a private-law subject (i.e., a foreign investor). This common denominator implies that the basis for this dispute is not a private-law-instrument based investor-state dispute. Rather, it is a public-law-instrument based investor-state dispute (that also involves the performance of actions of the state and its law in general). That is to say, these latter aspects indicate that the international investor-state dispute should be mainly judged in accordance with principles of public law.

Generally, it can be assumed that private individuals benefit from this public-law nature mechanism for solving a dispute. To reiterate, this mechanism is based on a public-law instrument, such as an IIA, which has been signed with the objective of promoting economic cooperation between the contracting parties for their reciprocal benefit. This means of cooperation has been called the creation of ‘conditions favourable to the flow of investment’.<sup>46</sup>

In such cases, the state’s behaviour, unlike the exercise of its private law capacity, is mainly subject to the application of principles of public law (i.e., including principles of domestic administrative law). In this respect, as will be seen in the sub-section entitled ‘Scope of causes’, this arbitral function involves, directly and/or tacitly, elements of public (constitutional and administrative) law principles such as those used in the domestic mechanisms to resolve a state/individual dispute.

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<sup>46</sup> See Brownlie, *supra* note 21, on page 61.

Finally, as was mentioned by the *Azurix Corp. v. Argentina*'s tribunal,<sup>47</sup> the purpose of treaty-based investor-state arbitration can be deduced from the scope and function of an arbitral tribunal. Scope and function issues summarise the purpose of the treaty-based investor-state arbitration as the settlement of a 'legal controversy'.<sup>48</sup> In fact, this tribunal states that this 'legal controversy' must arise from the breach of a treaty obligation which is different to those claims based on and settled in accordance with the provisions of the contract.

Moreover, the tribunal in *Azurix Corp. v. Argentina* clarified the difference between a 'legal controversy' and a 'conflict of interests'. To this end, the arbitral tribunal quoted the Board of Directors of the World Bank with regard to the meaning of a 'legal controversy'. A 'legal controversy' refers to "the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation, and is more than a mere 'conflict of interest'."

Within this context, it is important to highlight that such a legal controversy is also derived from the host state's regulatory behaviour which is mainly governed by principles of public law, including constitutional and administrative laws. These principles should be used as a legal reference for arbitral judges when dealing with international regulatory disputes, owing to the fact that some of these principles may have been underdeveloped and not readily available in international law<sup>49</sup> – as was

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<sup>47</sup> See, e.g., *Azurix Corp. v. la Republica Argentina* (ICSID Case No. ARB/01/12) December 8, 2003 – Decision on Jurisdiction, paragraph 58.

<sup>48</sup> In the *Mavrommatis* case, the Permanent Court of International Justice defined a controversy as '*a disagreement over a legal or factual question, a conflict of legal points of view or a conflict of interests between two persons*'. The *Mavrommatis Palestine Concessions* (Greece-UK), Permanent Court of International Justice, Decision No. 2, 20 August 1924, P.C.I.J. Collection of Judgements, Series A, No. 2 (1924), on page 6.

<sup>49</sup> See Adaralegbe, *supra* note 3, on page 88.



pointed out by the tribunal in *Mobil Corporation et al v. Venezuela* in their decision on jurisdiction.<sup>50</sup>

#### iv. Types and main characteristics

The regular content of an IIT's provisions includes two types of treaty-based arbitrations: (i) state-state arbitration and (ii) investor-state arbitration.<sup>51</sup>

The treaty-based state-state arbitration is conceived by the contracting parties to be a mechanism to resolve differences that derive from the interpretation or application of the treaty and in accordance with the rules of international law. In other words, this is a settlement mechanism that is considered to resolve any legal controversy between two subjects of public international law. It is imperative to state that this legal controversy must derive from the breach of provisions of an IIT.

In this respect, article VIII (1) of the USA-Argentina BIT states that:

*Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. (Emphasis added).*

However, treaty-based investor-state arbitration is additionally regarded, by the same public-law contracting parties, to be a mechanism to resolve the differences between one of the contracting parties and the national of the other.

An essential element of this settlement instrument is that the contracting parties should consent, *a priori*, to include some of the following aspects in IIA provisions: ranging

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<sup>50</sup> The arbitral tribunal in this case stated that 'rules governing a State's unilateral acts in international law have never been codified and remain controversial on a certain number of points.' See paragraph 87.

<sup>51</sup> See Sornarajah, *supra* note 15, on page 296.

from the simple solution of economic issues such as the determination of a fair compensation (e.g., article 9 of the Bulgaria-China BIT), to complex issues that require the application or interpretation of some treaty provisions (e.g., article 10 of the Spain-Colombia BIT), and possibly to even more complicated issues such as those regarding any type of investment celebrated under the scope of a given IIT (e.g., article VI of the USA-Ecuador BIT).

As was mentioned above, in many of these cases, it must be noted that the host state's regulatory conduct is involved. Under these cases, the host state involvement should not only represent the monitoring of its regulatory conduct in accordance with rules of international law, but also the due observance of some rules of domestic public law.

Why should such a consideration be taken into account? Because, as was stated in the separate opinion of Professor T. Wälde in the case *Thunderbird v. Mexico*, 'investment arbitration... does not set a system of resolving disputes between presumed equals as in commercial arbitration, but a system of protection of foreign investors that [are at a disadvantage due to their] exposure to political risk, lack of familiarity with and integration into, an alien political, social, cultural, commercial, institutional and legal system.'<sup>52</sup>

The arbitral tribunal in this case also referred to the necessity of taking into consideration the division of international arbitrations in commercial and investment arbitrations. Therefore, some scholars have pointed out that commercial arbitrators tend to see investment arbitration as just another type of commercial dispute between two

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<sup>52</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 5, on paragraph 12.

equal parties; conversely other authors have considered them to be two different types of arbitration.<sup>53</sup>

In addition, it is of vital significance that investment arbitrations are largely related to regulatory disputes between a host state for the exercise of its administrative power and a foreign investor for the consequent infringement of its rights; whereas commercial arbitrations are related to private contractual disputes either between private parties or between public entities and private parties.<sup>54</sup> For this reason, despite the fact that investment arbitration has some similar characteristics to commercial arbitration, it has been stated that ‘investment arbitration is fundamentally different from international commercial arbitration’.<sup>55</sup>

Consequently, a question has been raised concerning the real legal nature of this international mechanism. In this regard, and based on the previous mentioned aspects, in his recent doctoral thesis (2009), Dr. Adebayo Adaralegbre drew attention to the fact that ‘[i]t is possible that the system [investment legal system] manifests very strong features of an administrative enforcement procedure in domestic administrative law, or such other enforcement systems...’<sup>56</sup>

Finally, there exists – in scholarly literature on the subject – a tendency to allocate or identify this type of arbitration within the traditional classification of arbitrations.<sup>57</sup> In other words, there is a tendency to allocate this type of arbitration within the

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<sup>53</sup> See Van Harten, *supra* note 5, on page 6.

<sup>54</sup> See S. Wilske, M. Raible, and M. L. Markert, *International Investment Treaty Arbitration and International Commercial Arbitration – Conceptual Difference or only a “Status Thing”?* 1 *Contemp. Asia Arb.* 213 (2008) <HeinOnline> (Last visit 29/10/2009), on page 215.

<sup>55</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 5, on paragraph 12. See also Adaralegbre, *supra* note 3, on page 149.

<sup>56</sup> See also Adaralegbre, *supra* note 3, on page 149.

<sup>57</sup> Article 116 del Decreto Colombiana Numero 1818 de 1998, quoted by E. Silva Romero, and F. Mantilla Espinosa, *El Contrato de Arbitraje* (Universidad del Rosario – Legis, Colombia 2008), on page 204. See also B. Sanso de Ramirez, *Del Arbitraje Comercial en Venezuela* in *Ciclo de Conferencias sobre El Otro Lado del Arbitraje Internacional de Inversiones*, Julio 2009, published by PDVSA La Estancia, pages 101-121.

classification of arbitrations where there is *independent arbitration* (known as the one in which the parties autonomously agree on the rules of procedure applicable to that controversy<sup>58</sup>), *institutional arbitration* (known as the one in which the parties agree to be submitted to a procedure established by a centre of arbitration<sup>59</sup>), and *legal arbitration* (known as the one in which, in case of the absence of these agreements, the arbitration is carried out in accordance with the law in force<sup>60</sup>).

Within this classification, it is important to note that the majority of treaty-based investor-state arbitrations can be classified as institutional arbitrations since most of investment treaties provide for the ICSID as the preferred forum to resolve this type of investment dispute.

#### v. Consent of the host state to arbitrate

One of the legal aspects of treaty-based investor-state arbitration which has been the cause of controversy among many scholars is the determination of the host state's consent to arbitrate.<sup>61</sup> This debate has been based on the determination of the parties' offer and the acceptance with regard to arbitration.<sup>62</sup> In this regard, it has been said that investor-state treaty arbitration mechanisms are 'creatures of consent'.<sup>63</sup> As a preliminary comment, it is noteworthy to indicate that, even though the discussion of

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<sup>58</sup> Silva Romero and Mantilla Espinosa, *supra* note 57, on page 204.

<sup>59</sup> *Ibid.*, on page 204.

<sup>60</sup> *Ibid.*, on page 204.

<sup>61</sup> See, e.g., Rondon de Sanso, *supra* note 12, on page 123; and Sornarajah, *supra* note 15, on page 251.

<sup>62</sup> See, e.g., A. Sanabria Gómez, *La formación del consentimiento con relación al contrato de arbitraje* in Silva Romero and Mantilla Espinosa, *supra* note 57, pages 153-172.

<sup>63</sup> See Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, UK, 2009), pages 69-72 and on page 74.

the offer-acceptance aspect is beyond the scope of this research, such consent must be free of legal vices or defects, i.e., free of fraud, error or duress.<sup>64</sup>

Regarding the scope of this research, it is of relevance to mention that there is even a debate about whether the host state's consent has to be written, formal and authentic or whether tacit consent is sufficient.<sup>65</sup> In this respect, there is a general principle which asserts that there must be express, clear and unambiguous consent given by the parties in order to arbitrate.<sup>66</sup> Therefore, this consent is considered as an elemental prerequisite to arbitration.<sup>67</sup> In fact, most of IIA arbitration clauses refer to the ICSID Convention which requires – in article 25 – the existence of written consent from both parties to the dispute.

On this topic, it can be pointed out that there are two groups of treaties that contain different clauses which validate the existence of a contracting party's consent in different ways.

The first group is created by those treaties that do not require further interpretation regarding a state's consent since their provisions clearly establishes the host state's consent to arbitration in advance. For example, article I (1) (b) of the USA-Panama BIT Amendment<sup>68</sup> states that '[e]ach Party hereby *consents to the submission of an investment dispute* in accordance with the choice of the national or company...' (Emphasis added).

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<sup>64</sup> See, e.g., *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB/05/17) February 6, 2008 – Final Award in which the arbitral tribunal discussed the element of good faith when considering the vices of the consent.

<sup>65</sup> See A. Jaffe Carbonell, *Derecho Internacional Publico* (Academia de Ciencias Politicas y Sociales, Serie Estudios 70, Venezuela 2008), on page 94.

<sup>66</sup> See *Rondon de Sanso*, supra note 12, pages 123-174. See also *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) August 2, 2011 – Decision on Jurisdiction.

<sup>67</sup> See, e.g., Decision No 08-0763 of 17 October 2008, Constitutional Chamber, Supreme Tribunal of Justice (Venezuela).

<sup>68</sup> Protocol Amending the Agreement between the Government of the United States of America and the Government of the Republic of Panama (the USA-Panama BIT Amendment); (Panama, 1 June 2000; entered into force 14 May 2001).

Such a situation can also be found in treaties that have similar wording, such as article VI (2) of the USA-Ecuador BIT which states:

[I]f the dispute cannot be settled amicably, *the national or company concerned may choose to submit the dispute*, under one of the following alternatives, for resolution: [(a) to a national courts or (b) *to a previously agreed dispute-settlement procedures (i.e., arbitration)*]. (Emphasis added).

An even clearer case can be found in article 8 of the Venezuela-Barbados BIT which expressly states that:

[D]isputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, *at the request of the national concerned*, be submitted to [arbitration]. (Emphasis added).

On the other hand, there is another group which is created by investment treaties that make reference to the necessity of concluding a separate agreement to arbitrate. In such a case, the agreement must be concluded between the parties involved, i.e., the host state and the investor, *any time after the IIA has entered into force*.<sup>69</sup>

For example, article 8 (2) of the Venezuela-Vietnam BIT<sup>70</sup> states ‘[i]f consultations do not provide a solution within six months from the date of claim’s reception, the investor may submit the dispute, *by mutual consent*, to: [arbitration]’<sup>71</sup> (Emphasis added).

With regard to these types of clauses, there is a recent decision by an arbitral tribunal that makes reference to the consideration of national investment law as a unilateral

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<sup>69</sup> In *Mobil v. Venezuela* (2010), supra note 8, the arbitral tribunal made a clear statement about the Claimant’s claims and its timing in raising a violation of an IIT provision. The tribunal decided to take into consideration only those claims that arose after the day (i.e., after 21 February 2006) that the Claimant became a real Dutch company and disposed of the other claims. The tribunal decided only to take into consideration those claims that were protected by The Netherlands-Venezuela BIT.

<sup>70</sup> A similar example can be found in article 8 (2) of the Venezuela-Belarus BIT which states ‘[i]f the dispute has not been solved within the three (3) months from the date in which it was notified by written, for mutual consent, the dispute can be submitted to: [arbitration]’ (Emphasis added).

<sup>71</sup> Translated into English by the Author.

offer by the host state to arbitrate, i.e., a separate document to support the Claimant's request for arbitration.

An illustration of such a case is the Mobil Corporation *et al* v. Venezuela.<sup>72</sup> In this instance, the arbitral tribunal states that:

[C]onsent can be given through direct agreement between the host state and the investor. Under ICSID case law, consent may also result from a unilateral offer by the host State, *expressed in its legislation* or in a treaty, which is subsequently accepted by the investor.<sup>73</sup> (Emphasis added).

In this case, Venezuela argued that its national investment law 'does not provide the requisite clear and unambiguous consent to arbitrate for [said] dispute'.<sup>74</sup> In response to this particular issue, the arbitral tribunal, after analysing the case in detail, concluded that the Venezuelan Investment Law (i.e., article 22) 'does not constitute consent to jurisdiction with respect to any of the Claimants...'<sup>75</sup> Finally, the arbitral tribunal declared that it had jurisdiction over the claims based on the treaty provisions, i.e., article 9 of The Netherlands-Venezuela BIT.

As a final remark regarding state consent or regarding the contracting parties' intentions, it is significant to draw attention to the wording contained in some investment treaties clauses:

- 1) Article 10 (1) of the Colombia-Spain BIT states: '*[r]egarding administrative acts*, for submitting a claim to domestic forum or to arbitration provided under this Section, it will be indispensable to exhaust previously the governmental

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<sup>72</sup> See Mobil v. Venezuela (2010), supra note 8.

<sup>73</sup> Ibid., on paragraph 64. See also Schreuer, Malintoppi, Reinisch, and Sinclair, supra note 21, on page 89.

<sup>74</sup> See Mobil v. Venezuela (2010), supra note 8, on paragraph 26.

<sup>75</sup> See Mobil v. Venezuela (2010), supra note 8, paragraph 141. This position was confirmed by CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/15) December 30, 2010 – Decision on Jurisdiction and by Brandes v. Venezuela (2011), supra note 65

remedies when the legislation of the Party requests so.’<sup>76</sup> (Emphasis added); and,

- 2) Article 11 (2) of the Colombia-Switzerland BIT states ‘[a]ny issue that has not been solved within a period of six months from the written request’s date to consultations, *may be referred to administrative courts or tribunals* of the involved Party *or to international arbitration*’<sup>77</sup> (Emphasis added).

The idea of quoting these two clauses is to highlight, by way of reference, the intention of the contracting parties to resolve regulatory issues through arbitration proceedings. In these cases, the contracting states expressly waive their immunity from jurisdiction by establishing – at the same level – the domestic administrative court or tribunal’s functions with the investment tribunals’ functions.<sup>78</sup> This is materialized through the incorporation – in advance – of public law matters into these two interchangeable treaty-based mechanisms to settle an investor-state dispute. Nonetheless, it has been said that such a waiver of immunity does not represent an extension of these functions to measures of execution.<sup>79</sup> Furthermore, it has also been said that ‘a restriction of the state’s sovereignty could not be construed in the absence of an express agreement to that effect.’<sup>80</sup>

Finally, given the tendency of removing the duty to exhaust local remedies from BIT provisions and the analogy which exists between ISTAs and domestic administrative tribunals/courts in reviewing the regulatory conduct of the state (at the international and

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<sup>76</sup> Translated into English by the Author.

<sup>77</sup> Translated into English by the Author.

<sup>78</sup> See Brownlie, *supra* note 22, on page 340.

<sup>79</sup> *Ibid.*

<sup>80</sup> See R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. Int’l L. & Pol. 953 (2006), on page 966.



national levels, respectively) and the consent of the host state to arbitrate public-law matters, it may be opportune to mention here that the main role of these two public-law adjudicatory mechanisms is to control the legality of the state's regulatory conduct. In this regard, these two parallel mechanisms of which review the regulatory conduct of the state should carry out the control of legality in order to find out whether the state's administrative action was also performed in accordance with the public interest and in accordance with the those administrative law principles that rule the regulatory conduct of the state (e.g., the principle of legality; principle of the public administration's discretion power; principle of proportionality; principle of equality before the law, etc.). Indeed, in reviewing the regulatory conduct of the state at the international level, the application or consideration of the above-mentioned principles could be carried out through the interpretation of the FET standard. Even, these principles can be applied to international regulatory disputes when there has been a denial of justice at the national level which leads to intervention by an international tribunal in order to vindicate and enforce private-individuals rights before the maladministration of justice on part the host state.

#### vi. Scope of causes

The scope of treaty-based investor-state arbitration is determined by the contracting states' consent as was pointed out previously. This scope can vary from (i) controversies regarding the amount of compensation to (ii) controversies on the interpretation of the regulatory conduct of the host state in accordance with the provisions of a given IIT and/or (iii) controversies related to any issue derived from an investment carried out under the obligations contained in an IIT's provisions. Within these three main scopes, many investment arbitrations have been submitted with the

intention of seeking compensation under the treaty provisions. The following subsections will address, in a simple and general manner, the four most popular causes that have been used as grounds to activate the use of the investment arbitration system.

- Reluctance to accept the host state's regulation

One of the principle motives that activates the investment arbitration system is the reluctance of foreign investors to accept the host state's regulation, understanding 'reluctance' in this context as the disagreement on the part of an investor with some of the host state domestic regulatory measures. This is particularly so if these domestic regulatory measures directly affect investors' interests. Thus, one obvious preliminary question is to what extent does the host state's regulatory conduct represent a real loss or reduction to the investors' rights or profits?<sup>81</sup>

In relation to this study, it is important to emphasize that the majority of host state's regulatory conduct is based on the principle of legality and its public interest. It is rarely based on the defective performance of foreign investors' responsibilities contained within a given investment contract.<sup>82</sup> For this reason, one may ask what regulatory conduct constitutes a host state's breach of the provisions of an IIT? Or, what can be considered to be a good reason to adopt such regulatory measures?<sup>83</sup>

There is a problem with these two questions from the perspective of international law and national law. The problem is related to the way in which treaty obligations or standards are drafted, since particular wording may represent a tacit limitation of the

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<sup>81</sup> In this context, Prof. Sornarajah draws attention to foreign investment contracts which have become too onerous to perform. See Sornarajah, *supra* note 15, on page 85.

<sup>82</sup> *Ibid.*, on page 13.

<sup>83</sup> *Ibid.*

host state's regulatory power.<sup>84</sup> Evidence of this tacit limitation of the regulatory power of the state is the incorporation of the FET standard within the provisions of an ITT and the incorporation of administrative law rights or acts within the definition of investment. These administrative law rights or acts have been considered as essential elements for the operation of any investment.<sup>85</sup> Examples of the inclusion of administrative acts within the definition of investment can be found, amongst other treaties, in article I (1)(a)(v) of the USA-Argentina BIT<sup>86</sup> and article 2 (e) of the Colombia-Spain BIT.<sup>87</sup>

An unfavourable situation is created when there is a risk that minimum regulatory standards adopted by a host state are considered to constitute a breach of an IIT obligation and, subsequently, giving rise to a state's international responsibility.<sup>88</sup> It is in such a situation that the scope of the domestic legal principle of legality may be in conflict with the scope of the principle of legality under international law. This is so because a host state must act in accordance with its domestic principle of legality. However, it is also possible that such conduct may imply some features of the abuse of power or illegality under international investment standards, particularly when the FET standard is taken into consideration.<sup>89</sup>

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<sup>84</sup> See G. Lysen, *State Responsibility and International Liability of States for Lawful Acts – A Discussion of Principles* (Iustus Forlaff Juridiska Foreningen I Uppsala, Sweden 1997), on page 15.

<sup>85</sup> See Sornarajah, *supra* note 15, on page 170.

<sup>86</sup> This treaty includes within its definition of investment, 'any right conferred by law or contract, and any licenses and permits pursuant to law...'.<sup>87</sup>

<sup>87</sup> This treaty includes within its definition of investment, '[c]oncessions granted by law, by an administrative act or by a contract, including concessions to explore, cultivate, extract or exploit natural resources...'. (This has been translated into English by the Author).

<sup>88</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 6. See also Lysen, *supra* note 84, on page 170.

<sup>89</sup> In this regard, the arbitral tribunal in *Azurix Corp v. Argentina* (2003), *supra* note 47, paragraph 391, agreed 'with the interpretation made by the Claimant that a measure needs only to be arbitrary to constitute a breach of the BIT.'

This is where arbitral tribunals play a key role within the investment arbitration system since investment arbitrators mostly act as public-law adjudicators.<sup>90</sup> It is also at this point that it is important to consider the host state's legal principles since they should not be isolated from international law principles when evaluating the alleged 'unlawful regulatory conduct' by the host state.<sup>91</sup>

There are arbitral tribunals that have directly reviewed, analyzed and weighed up the regulatory conduct of the host state's government and its administrative entities in accordance with international rules.<sup>92</sup> For example, in *Metalclad Corporation v. Mexico*<sup>93</sup>, the arbitral tribunal (i) judged the performance of a public entity of the Mexican state<sup>94</sup> and (ii) acted as an administrative court.<sup>95</sup>

Similarly, in *Waste Management Inc v. Mexico*,<sup>96</sup> the arbitral tribunal (i) declared that there was doubt about the legal nature of a Mexican public entity's (i.e., BANOBRAS)<sup>97</sup> and (ii) considered the regulatory conduct of each Mexican entity involved in the case.<sup>98</sup>

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<sup>90</sup> See Chapter V for more details.

<sup>91</sup> It must be taken into account that 'unlawful' in this context can be assimilated into the notion of 'illegal'. See paragraph 10.3. (a), *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) January 26, 2006 – Final Award.

<sup>92</sup> See, for more, Van Harten and Loughlin, *supra* note 5; See also Van Harten, *supra* note 5.

<sup>93</sup> *Metalclad Corporation v. Estados Unidos Mexicanos* (ICSID Case No. ARB (AF)/97/1) August 30, 2000 – Final Award.

<sup>94</sup> See, e.g., *Metalclad v. Mexico* (2000), *supra* note 93, paragraph 86, when the tribunal states that the conduct of the Council to grant a permit was 'inadequate'.

<sup>95</sup> *Ibid.*, paragraphs 93 and 106 where the tribunal states that the refusal of the Municipality to grant Metalclad a construction permit did not have a proper foundation and, therefore, the Municipality acted outside its authority. *Metalclad v. Mexico* (2000), *supra* note 93.

<sup>96</sup> See *Waste Management, Inc v. Estados Unidos Mexicanos* (ICSID Case No. ARB(AF)/00/3) April 30, 2004 – Final Award.

<sup>97</sup> *Ibid.*, paragraph 75 where the tribunal states that 'the mere fact that a determined entity is owned by the state or the state has a majority control of this entity does not convert it ipso facto into a state organ' (Translated by the Author). *Waste v. Mexico* (2004), *supra* note 96.

<sup>98</sup> See, e.g., *Waste v. Mexico* (2004), *supra* note 96, paragraphs 100-117.

In *Occidental Exploration and Production Company v. Ecuador*,<sup>99</sup> the tribunal stated that:

[The investment] environment was changed *as matter of policy and legal interpretation*, thus resulting in the breach of fair and equitable treatment. This breach relates *to the effects of both revoking the Granting Resolutions* and denying further VAT refunds. (Emphasis added).

In *Tza Yap Shum v. Peru*,<sup>100</sup> the tribunal forced or misconstrued an interpretation of the Peruvian state's intention to conclude the Peru-China BIT in order to benefit an investor.<sup>101</sup>

Finally, there is the case of *Compañía de Desarrollo Santa Elena v. Costa Rica*<sup>102</sup> where the tribunal weighed the private interest over the public interest when it stated that '[e]xpropriatory environmental measures – *no matter how laudable and beneficial to society as whole* – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies...' <sup>103</sup> (Emphasis added).

These examples, amongst many others, include, in one way or another, a reluctance of both foreign investors and arbitral tribunals to recognize the application of domestic administrative law principles (i.e., the host state's classic law) to these disputes through the application of the FET standard. This is perhaps where the regulatory conduct of the host state and existence of administrative law principles clash or conflict with international rules.

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<sup>99</sup> See *Occidental Exploration and Production Company v. The Republic of Ecuador* (London Court of International Arbitration Administered Case No. UN 3467), July 1, 2004 – Final Award.

<sup>100</sup> See *Tza Yap Shum v. Republica del Peru* (ICSID Case No. ARB/07/6) June 19, 2009 – Decision on Jurisdiction.

<sup>101</sup> *Ibid.*, on paragraphs 122, 128, 188 and 213.

<sup>102</sup> See *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID No. ARB/96/1) February 17, 2000 – Final Award.

<sup>103</sup> *Ibid.*, paragraph 72.

Nonetheless, the good news is that some arbitral tribunals have already recognized the inadequacy of some principles of international law to properly cope with and address treaty-based regulatory disputes between a host state and private individuals. In this context, the arbitral tribunal in *Mobil Corporation et al v. Venezuela*,<sup>104</sup> recognized that ‘[r]ules governing a State’s unilateral acts in international law have never been codified and remain controversial on a certain number of points’.

Similarly, the arbitral tribunal in *Waste Management Inc v. Mexico* (quoting the *ADF Group Inc v. United States of America Final Award*), stated that ‘both customary international law and the minimum standard of treatment of aliens it incorporates [referring to article 1105(1) of the NAFTA], are constantly in a process of development.’<sup>105</sup> And finally, this latter tribunal also stated that ‘bilateral investment treaties are not an insurance policy against bad business decisions.’<sup>106</sup>

- Economic and social stability of the host state

Another aspect of the legal synergy between a host state and investor’s interests is the protection and guarantee of the host state’s economic and social stability and the increase of foreign investments.<sup>107</sup> It is at this point that the host state often faces a dilemma between what can be a balanced-legal-socio-economic measure to protect the national public interest and how to protect the foreign investors’ interests at the same time.<sup>108</sup>

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<sup>104</sup> See, e.g., *Mobil v. Venezuela* (2010), supra note 8, paragraph 87.

<sup>105</sup> See *Waste v. Mexico* (2004), supra note 96, paragraph 92.

<sup>106</sup> *Ibid.*, paragraph 114 and 177.

<sup>107</sup> With regard to this point, Prof. Sornarajah enumerates a list of reasons as to why a host state may want to protect its economic and social stability. He mentions: (i) ideological hostility; (ii) nationalization; (iii) global changes within an industry; (iv) renegotiation of contracts; (v) onerous contracts; (vi) ethnicity as a factor; (vii) regulation of the economy; and (viii) corruption of previous governments. See Sornarajah, supra note 15, on page 77.

<sup>108</sup> L. Kaplow, and S. Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Massachusetts and London, 2002).

It has been said that this governmental dilemma may represent a risk to foreign investments since such uncertainty may result ‘...from either regime changes or changes to the existing political and economic policies of the host state’.<sup>109</sup> In particular, if the host state has to take into account its socio-economic development and its national welfare. Consequently, this is why it has been argued that there is a need to consider the factors of social stability and economic circumstances which should exercise a strong influence on the manner of promoting investments.<sup>110</sup> It is perhaps for this reason that it has been highlighted in this context that ‘the best form of stabilisation is an equitable deal’.<sup>111</sup>

Some arbitral tribunals have timidly referred to the difficult economic situation that some host states have faced during the performance of foreign investors’ activities within their territories. For example, in *Azurix Corp. v. Argentina (Final Award)*, Argentina requested the arbitral tribunal to take into consideration the fact that ‘... during the period under review the country was undergoing the worst economic, social and institutional crisis in its history.’<sup>112</sup> The arbitral tribunal positively and negatively took elements related to Argentina’s economic crisis into consideration<sup>113</sup> by recognizing that ‘[t]he Tribunal understands that governments have to be vigilant and protect the public health of their citizens...’.<sup>114</sup> However, on the other hand, determining that the performance of Argentina’s provincial authorities ‘... contributed to the crisis rather than assisting in solving it.’<sup>115</sup>

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<sup>109</sup> See Sornarajah, *Supra* note 15, on page 76.

<sup>110</sup> *Ibid.*, on page 217.

<sup>111</sup> G. Kahale III, *The Upoar Surrounding Petroleum Contract Renegotiations*, 82 *Oxford Energy Forum* (August 2010) – Oxford Institute for Energy Studies, on page 5.

<sup>112</sup> See *Azurix v. Argentina*, *supra* note 47, paragraph 400.

<sup>113</sup> *Ibid.*, paragraph 57.

<sup>114</sup> *Ibid.*, paragraph 144.

<sup>115</sup> *Ibid.*, paragraph 144.

Another example of this timid arbitral practice can be found in *Waste Management Inc v. Mexico* (Final Award), where the arbitral tribunal also made a reference to another country's economic situation. In this case, reference was made to Mexico's financial crisis of December 1994. The tribunal considered this aspect as '... an important part of the background to the case...' <sup>116</sup> Thus, the tribunal recognized that this financial crisis affected the financial plans of Mexico as well as those of the Claimant. <sup>117</sup> In reaching this conclusion, the arbitral tribunal simultaneously analyzed the conduct of the Mexican authorities concerned in order to determine the exoneration of Mexico's international responsibility. <sup>118</sup>

Lastly, a similar example can be found in *Aucoven v. Venezuela* (Final Award) <sup>119</sup> where the arbitral tribunal made reference to Venezuela's social crisis in 1989. The tribunal stated that '... the impact of the tragic events of the 1989 Caracazo cannot be underestimated.' <sup>120</sup> This consideration was emphasized by the tribunal to determine Venezuela's contractual responsibility regarding the breach of concession agreement obligations that were agreed upon with Aucoven.

The problem between the consideration of the host state's social and economic aspects within the arbitral proceedings and the consideration of the host state's social reality by national courts is that investment arbitrators may not be fully aware of these socio-economic circumstances. In fact, this problem may induce investment arbitrators to de-contextualize the host state's socio-economic reality or status when they traditionally base their decision on the facts provided by the disputing parties.

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<sup>116</sup> See *Waste v. Mexico* (2004), supra note 96, paragraph 101.

<sup>117</sup> Ibid., paragraph 112.

<sup>118</sup> Ibid., paragraph 100.

<sup>119</sup> See *Autopista Concesionada de Venezuela, C.A. (AUCOVEN) v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) September 23, 2003 – Final Award.

<sup>120</sup> Ibid., paragraph 114.



As was already mentioned, the risk of considering minimum regulatory behaviour of the host state as a breach of an IIT obligation, along with the failure of investment arbitrators to contextualize the host state's conduct, may represent irreparable damage to the host state's economic and social stability.<sup>121</sup>

A good example of this risk, as well as of a de-contextualized decision, can be found in *Mobil Cerro Negro Limited v. Petroleos de Venezuela, S.A.*<sup>122</sup> where a British Court needed to set aside a freezing order previously granted by Teare J. on 24 January 2008 under section 44 of the British Arbitration Act 1996. In this case, the Claimant attempted, through a worldwide freezing injunction commonly applicable to serious international fraud for the 'dissipation of assets', to freeze the assets of the Venezuelan National Oil Company for the amount of US\$ 12 billion because the Venezuelan government decided to re-nationalize its oil industry and the government was in risk of not honouring the commitments assumed with the Claimants. Obviously, if this order had succeeded, the Venezuelan financial situation would have been seriously affected since states work with fixed budgets.<sup>123</sup>

A final concern is that there is a collision not only between principles of administrative law (applicable to the state's regulatory conduct) and international rules, but also between the international rules themselves. This is so because there seems to be a conflict between the international principle which states that '[a state] may not invoke the provisions of its internal law as justification for its failure to perform a treaty',<sup>124</sup> and the international principle that recognizes a host state's right to change economic or

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<sup>121</sup> See *Thunderbird v. Mexico* (2006) – Separate Opinion *supra* note 5.

<sup>122</sup> *Mobil Cerro Negro Limited v. Petroleos de Venezuela, S.A.* (Case No. 2008, Folio 61 – High Court of Justice – Queen's Bench Division – Commercial Court) London, UK (March 18, 2008).

<sup>123</sup> Other similar worldwide freezing measures were also granted in *The Netherlands* (for US\$ 12.000.000.000), *Aruba* (for US\$ 12.000.000.000) and *Curacao* (for US\$ 12.000.000.000) against PDVSA's assets plus a provisional embargo measure for US\$ 315.000.000 in New York, USA.

<sup>124</sup> Article 27 of Vienna Convention.

other policies. This latter principle is embodied in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States.<sup>125</sup>

- Expropriation and compensation

Expropriation and the subsequent compensation are the two most common motives that have been used by foreign investors in order to activate the ISTA. In this regard, arbitral cases range from the simple determination of the amount of compensation (e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*<sup>126</sup>) to more complex issues regarding the evaluation of the host state's regulatory conduct to determine or define what has been known as 'indirect expropriation' (e.g., *Metalclad Corporation v. Mexico*<sup>127</sup>). Both scenarios mainly involve, in one way or another, the assessment of the host state's regulatory conduct by investment arbitrators.

It is necessary to highlight that these scenarios are encompassed with the host state's socio-economic situation since the host state's public policy requires taking actions to regulate certain industrial activities that are fundamental for the sustainable development of the state (i.e., through the nationalization<sup>128</sup>) or may require taking actions to deregulate the domestic market due to the need of cash flow on the part of host state (i.e., through the privatization).

Professor P. Stevens's article on *Oil Wars: Resource Nationalism and the Middle East* is worth mentioning here. This article identifies a 'cyclical phenomenon' that

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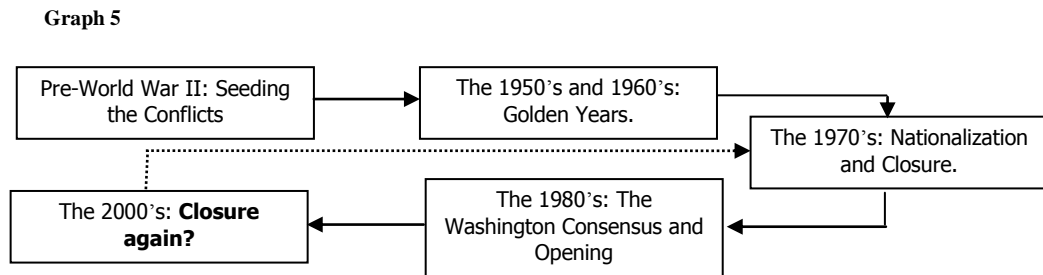
<sup>125</sup> 'Each state has the right freely to choose and develop its political, social, economic and cultural systems'. UNGA Res. 2625 (XXV) 1970; quoted by Sornarajah, supra note 14, on page 76.

<sup>126</sup> See *Santa Elena v. Costa Rica* (2000), supra note 102.

<sup>127</sup> See *Metalclad v. Mexico* (2000), supra note 93.

<sup>128</sup> In this regard, it has been stated that, even though both nationalization and expropriation are sovereign powers belonging to the State, there is a tendency to conceptually confuse these two terms. On the one hand, nationalization is constituted by a legal reserve carried out by the state on goods, companies or industrial activities. On the other hand, expropriation is carried out by a state to coercively acquire properties belonging to private individuals, subject to a fair and opportune compensation. See, e.g., Rondon de Sanso, supra note 12, pages 61-63.

summarizes the host state's regulation and deregulation activity in the oil sector (see Graph 5 for illustration).<sup>129</sup>



*Source:* Graph elaborated by the author with information collected from P. Stevens, *Oil Wars* (2007)

Graph 5 illustrates the historical moments when states have been required to take restrictive regulatory actions and/or take investor friendly regulatory actions in order to guarantee their national development. This cyclical phenomenon is not only useful to illustrate the oil sector's world cycle but is also useful to illustrate and allocate the economic events from other states such as the Argentinean economic crisis of 1999 and the Mexican financial crisis of 1994. Within the ups and downs of the cycle a wave of nationalistic and expropriatory measures were undertaken.<sup>130</sup> Nonetheless, it is important to emphasize that there may be other expropriatory activities that are not necessarily framed within the above cycle.

With regard to compensation, a good example of an investor-state dispute on the determination of a fair amount of compensation for the expropriatory actions taken by the host state can be found in *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*.<sup>131</sup> In this case, an economic-technical issue of determining the fair level of compensation was converted into a general review of the Costa Rican government's

<sup>129</sup> P. Steven, *Oil Wars: Resource Nationalism and the Middle East*, in Andrews-Speed, P., *International Competition for Resources – The Role of law, the state and of markets* (Dundee University Press, CEPMLP, UK, 2008). See also Kahale III, *supra* note 111, on page 3.

<sup>130</sup> See Kahale III, *supra* note 111, on page 3.

<sup>131</sup> See *Santa Elena v. Costa Rica* (2000), *supra* note 102.

administrative actions. In this context, Costa Rica's government expressly expropriated the Claimant's property known as 'Santa Elena' and offered the Claimant an amount of approximately US\$ 1,900,000 by way of compensation; whereas the Claimant claimed an amount of approximately US\$ 6,400,000. The expropriatory measure was based on aspects of national interest (i.e., the maintenance of the environmental equilibrium) and it was carried out by a Presidential Decree (i.e., an administrative act). Both parties expressed their consent to the expropriatory measure, but disagreed on the amount of compensation.

The arbitral tribunal took the following points into consideration in order to determine the fair market value of the property: (i) the consideration of principles of American law into the arbitral process (i.e., the Claimant's law);<sup>132</sup> (ii) the forced consent of the Costa Rican Government to international arbitration based on the pressure of the receiving a loan of US\$ 175,000,000 from the Inter-American Development Bank;<sup>133</sup> (iii) the application of Costa Rican law and the role of international law;<sup>134</sup> (iv) the priority of private interests over public interests;<sup>135</sup> (v) the legal evaluation of the expropriatory measure itself;<sup>136</sup> and (vi) making the property's formal registration (protocolization) subject to the full payment of the amount of the award.<sup>137</sup> Ultimately, the Costa Rican government was ordered to pay an amount of US\$16,000,000.

With regard to these various points, one should ask: Why did the arbitral tribunal evaluate the regulatory conduct of the Costa Rican government, although the parties did not disagree on the adoption of the measure? Why did the arbitral tribunal not consider

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<sup>132</sup> Ibid., on paragraph 24.

<sup>133</sup> Ibid., on paragraph 25.

<sup>134</sup> Ibid., on paragraphs 28 and 65.

<sup>135</sup> The arbitral tribunal stated that '[e]xpropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are... expropriatory measures...' (Emphasis added). Ibid., paragraphs 72, 86 and 87.

<sup>136</sup> Ibid., paragraphs 54, 65 and 77.

<sup>137</sup> Ibid., paragraph 111.

the forced consent of the Costa Rican government? Why, after deciding to apply the Costa Rican law, did the arbitral tribunal inject principles of American law into the process? Why did the arbitral tribunal weigh private individual interests over the national public interest? Why, after deciding to apply the principles of international law, did the arbitral tribunal ignore the content of Resolution 3.281 (XXIX)(1974) of the UN General Assembly that refers to national law in order to determine the amount of compensation?<sup>138</sup> Do international arbitrators have to acknowledge the principle of *iuris novit curia* (the court knows the law)? The answers to these questions will continue to remain unclear to many public law lawyers for the foreseeable future.

In relation to expropriatory actions, there are more complex decisions. These decisions not only involve an indirect evaluation of the host state's regulatory conduct but also a direct evaluation of the state's conduct as well as the definition and support of an international legal aspect that has never existed within the domestic legal system of any country. This legal aspect is the notion of 'indirect expropriation'.

A controversial example of this is seen in *Metalclad Corporation v. Mexico* (Final Award).<sup>139</sup> In this case, the Claimant alleged that Mexico, through its local authorities' regulatory behaviour, interfered with the development of its business (i.e., local operation of a hazardous waste landfill). It also alleged that Mexico breached article

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<sup>138</sup> Article 2 (c) of the Resolution 3.281 (XXIX), 12 December 1974, Charter of Economic Rights and Duties of States – Adopted by the General Assembly during its 29<sup>th</sup> Session that states 'Each state has the right:... [t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting said measures, *taking into account its relevant law and regulations, and all circumstances that the State considers pertinent. In any case that the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed* by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice means.' (Emphasis added) See <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>> (Last visit 24/01/2010).

<sup>139</sup> See *Metalclad v. Mexico* (2000), *supra* note 93.

1110<sup>140</sup> of the NAFTA (expropriation and compensation). Mexico denied these allegations.

The arbitral tribunal made the following observations: (i) the consideration of the Ecological Decree's legal nature was within its jurisdiction;<sup>141</sup> (ii) the evaluation of the Municipality's conduct as 'improper';<sup>142</sup> (iii) the judgement of the Mexico's domestic administrative proceedings in accordance with principles of international law<sup>143</sup>; (iv) the criticism as to the lack of technical motivation (i.e., lack of 'construction aspects or flaws of the physical facility') of the Municipality's act;<sup>144</sup> (v) the determination of Mexico's Federal Government competences;<sup>145</sup> and (vi) the consideration of the Municipality's regulatory conduct as a behaviour 'outside its authority'.<sup>146</sup> Ultimately, the arbitral tribunal considered that all these administrative law points were an interference with the use of Claimant's property and they therefore constituted indirect expropriation without compensation.<sup>147</sup>

As can be seen, issues presented to arbitral tribunals not only involve the consideration of technical issues such as the determination of a fair amount of compensation, but also increasingly involve aspects related to the state's regulatory behaviour. This latter practice has been the main role of domestic courts and the function of administrative law principles.

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<sup>140</sup> This article states that '[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with the due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through to 6.' North American Free Trade Agreement (Texas, 17 December 1992, entered into force 1 January 1994). <<http://www.sice.oas.org/trade/nafta/naftatce.asp>> (Last visit 15/08/2010).

<sup>141</sup> See *Metalclad v. Mexico* (2000), *supra* note 93, paragraph 69.

<sup>142</sup> *Ibid.*, paragraph 86.

<sup>143</sup> *Ibid.*, paragraph 88.

<sup>144</sup> *Ibid.*, paragraph 69.

<sup>145</sup> *Ibid.*, paragraph 105.

<sup>146</sup> *Ibid.*, paragraph 106.

<sup>147</sup> *Ibid.*, paragraphs 103 and 112.

○ Renegotiation of long-term investment contracts

Recently, some governments such as those of Canada,<sup>148</sup> Venezuela,<sup>149</sup> Ecuador,<sup>150</sup> Bolivia<sup>151</sup> and Kazakhstan<sup>152</sup> have opted for reviewing, through renegotiations, a group of long-term investment agreements, their terms and conditions and/or the applicable fiscal regimes.

This practice has been adopted despite the tendency to consider the international law principle of the sanctity of the contract. This principle denies the state's right to unilaterally change the conditions of an investment agreement, instead of considering these long-term investment contracts as state's contracts (i.e., administrative contracts or government contracts).<sup>153</sup> Curiously, this practice has mainly included hydrocarbon agreements due to their importance to the host state's socio-economic development.

Additionally, this non-contentious measure of renegotiating long-term investment agreements has been taken on grounds of changed circumstances. For example, whether the contracts have been too onerous for the country or the contracts did not comply with the public objectives of the government in power, i.e., including the objectives of the protection of national welfare as well as the adoption of nationalistic measures.<sup>154</sup> The latter point primarily represents the conflicting interests that arise

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<sup>148</sup> *Alberta losing billions in oil royalties: report*, CBC New Website <<http://www.cbc.ca/canada/calgary/story/2010/11/25/calgary-alberta-oil-gas-royalty-report.html>> (Last visit 11/01/2011).

<sup>149</sup> *Venezuela's Oil Policy, A Sticky Proposition – Take a tiny bit of it, or leave it*, The Economist <<http://www.economist.com/node/14382525>> (Last visit 11/01/2011).

<sup>150</sup> *Ecuador oil policy upsets private firms*, BBC Website, <<http://news.bbc.co.uk/1/hi/business/5359458.stm>> (Last visit 11/01/2011).

<sup>151</sup> *Oil and Gas Policy in Bolivia – Post-election Update*, The Democracy Centre Website <<http://www.democracyctr.org/bolivia/investigations/gas/oilgas.htm>> (Last visit 11/01/2011).

<sup>152</sup> *Kazakhstan: Officials jubilant over oil-field renegotiation deal*, Gazeta.kz Website <<http://engarticles.gazeta.kz/art.asp?aid=104034>> (Last visit 11/01/2011).

<sup>153</sup> See Sornarajah, *supra* note 15, on page 94.

<sup>154</sup> *Ibid.*, on pages 83 and 85.

between a private company and a state national company acting as representative of the host state's interest.<sup>155</sup>

Moreover, throughout the duration of these long-term investment agreements, governments may change and so many their public aims.<sup>156</sup> Here it is important to re-emphasize that each country has the right to change economic or other policies.<sup>157</sup>

It has been argued that 'these agreements were entered upon at a time when the host country was politically or economically weak, or was badly advised...'<sup>158</sup> Therefore, as soon as the new political regime realizes the problem, it seeks renegotiations.<sup>159</sup> This exercise has not been well received<sup>160</sup> by foreign investors. Foreign investors have opted to reject this idea or, in some cases, have made complaints at an international level through arbitration.<sup>161</sup> Nonetheless, it has been admitted that renegotiation 'is today an "integral feature of foreign investment process"'.<sup>162</sup>

For example, in the case of Venezuela, during the implementation of its new oil policy known as '*Plena Soberania Petrolera*',<sup>163</sup> the Venezuelan government successfully reached renegotiations with almost all international oil companies that had a petroleum businesses in Venezuela. However it failed to do so with two of them (ConocoPhillips

<sup>155</sup> See, e.g., Kahale III, supra note 111, on page 1.

<sup>156</sup> S. Kroll, *The Renegotiation and Adaptation of Investment Contracts*, Transnational Dispute Management Vol. 1, Issue 3 (2004).

<sup>157</sup> See supra note 125.

<sup>158</sup> See, e.g., Kahale III, supra note 111; T. W. Wälde, The present State of Research Carried Out by The English-Speaking Section of the Centre for Studies and Research, pages 63-154 (2004), on page 153; and Sheppard and Hunter, supra note 3, on page 153.

<sup>159</sup> Here, a statement made by US Secretary of the Interior (19/03/2009) may be of relevance when he states "Just as your shareholders expect you to get a fair return on your investments...the American people are asking the same of us as we manage their resources." Quoted by Kahale III, supra note 111, on page 4. See also Kroll, supra note 155.

<sup>160</sup> Professor P. D. Cameron identifies the renegotiation process as 'a coercive approach to negotiations' and considers it not to be unusual but 'possibly even common'. See P. D. Cameron, *International Energy Investment Law – The Pursuit of Stability* (Oxford University Press, UK, 2010), on page 422.

<sup>161</sup> In this regard, Mr. George Kahale III says that the main investors' argument is '*the mantra pacta sunt servanda*', see Kahale III, supra note 111, on page 3.

<sup>162</sup> See Kroll, supra note 156, on page 46.

<sup>163</sup> See H. Rondón de Sanso, *El Régimen Jurídico de los Hidrocarburos – El Impacto del Petróleo en Venezuela* (First Edition, Epsilon Libros, Venezuela 2008), pages 411-426.



and ExxonMobil<sup>164</sup>). These two companies, despite the re-negotiation process, decided to opt for both investment and commercial arbitrations to pursue their compensatory petitions.

One of the risks for host states with this type of practice is that investment arbitrators at the moment of evaluating an arbitral case— may ignore the facts underlying the renegotiation.<sup>165</sup> Therefore, they may jump to a de-contextualized conclusion, for example the declaration of an indirect expropriation as a violation of any treaty-based obligation.<sup>166</sup>

vii. Analogy of ISTAs with some principles of domestic administrative law

Based on the previous sub-sections, it is necessary to draw attention to the analogy of a treaty-based investor-state adjudication in particular when dealing with regulatory disputes with some institutions and principles of domestic administrative law. This exercise can be based either on the public-law functions of *ad hoc* tribunals or on the public-law nature of the contractual treaty. Both of these features have some important similarities with (i) the functions and (ii) public-law legal nature of British administrative tribunals (including, in some instances, the functions of ordinary courts

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<sup>164</sup> ConocoPhillips requested arbitration before the International Chamber of Commerce (against the Venezuelan National Oil Company PDVSA and its subsidiaries), (Case No. CCI 17336/JRF) and requested a treaty-based arbitration against the Republic before the ICSID (ICSID Case No. ARB/07/30). Similarly, ExxonMobil presented an arbitration request before the International Chamber of Commerce against PDVSA and its subsidiary (Case No. CCI 15416/JRF) and presented a treaty-based arbitration against the Republic before the ICSID (ICSID Case No. ARB/07/27).

<sup>165</sup> For example, in the case of Venezuela, when the national government decided to implement its new oil policy, it decided to invite all International Oil Companies (IOCs) to renegotiate their former petroleum agreements in order to frame them within the legal framework of the new oil law (2001). Through this process of renegotiation, many IOCs accepted the terms and conditions proposed by the government. However, during this renegotiation process, two IOCs (ConocoPhillips and ExxonMobil) decided to leave the negotiation table due to their disagreement with the government's terms and conditions (mainly about the amount of compensation). Thereafter, both companies decided to opt for Investment Arbitration as an alternative mechanism to reach their petitions. See, e.g., Rondón de Sansó, *supra* note 163; and H. Rondón de Sansó, *Aspectos Jurídicos Fundamentales del Arbitraje Internacional de Inversión* (Editorial Ex libris, Caracas, 2010). See also *Mobil v. Venezuela* (2010), *supra* note 8, paragraphs 31 and 34

<sup>166</sup> See Kahale III, *supra* note 111, on page 3.

when dealing with judicial reviews) and French administrative courts (i.e., the function of its contentious-administrative jurisdiction).

In other words, firstly, both domestic legal systems provide internal mechanisms to deal with the legal differences caused by regulatory measures between the state (i.e., public administration) and private individuals. Secondly, both national and international public law adjudicatory mechanisms are created in accordance with the intention of the state (i.e., they are created through specific legal acts, e.g., legislative acts and international contractual treaties (IITs), respectively). For better picture about the analogies of ISTAs with some domestic legal remedies see Annex B.

Thus, as was previously pointed out, the idea of creating an investor-state adjudicatory mechanism at the international level corresponds with the idea of creating an international neutral forum, i.e., a kind of temporary supranational public-law tribunal to mainly review the host state's regulatory conduct.<sup>167</sup> Additionally, as has been said, 'one of the purposes of investor-State arbitration is to avoid local courts'.<sup>168</sup> If this premise were untrue, states would not have agreed on subscribing to and ratifying the ICSID Convention or any other investment treaty.

Article 13 (2) (a) of the Germany-Trinidad and Tobago BIT<sup>169</sup> states that '[i]f the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted, *upon request of a national or company*, either [1] *to the competent tribunal of the Contracting Party in whose*

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<sup>167</sup> Sornarajah, *supra* note 15, on page 256.

<sup>168</sup> See C. Schreuer, *The Coexistence of Local and International Law Remedies* in F. Ortino, A. Sheppard, and H. Warner, *Investment Treaty Law – Current Issues Volume 1* (British Institute of International and Comparative Law, London 2006), pages 158-164.

<sup>169</sup> Treaty between the Federal Government of Germany and the Republic of Trinidad and Tobago concerning the Encouragement and Reciprocal Protection of Investments (the Germany-Trinidad and Tobago BIT); (Berlin, 8 September 2006).

*territory the investment was made, or [2] to international arbitration...*' (Emphasis added). This quotation reflects the intention of the contracting states in creating, through an IIT dispute-settlement clause, the alternative possibility of choosing – at the request of foreign investors – between national courts and international arbitrations (known as 'the-fork-in-the-road clause').

Furthermore, the above-mentioned practice also reflects that contracting parties are conscious of the fact that they are waiving their immunity from jurisdiction in favour of the creation of a temporary public-law state-state-agreed international tribunal. Clearer evidence of this argument can be found in article 11 of the Colombia-Switzerland BIT which expressly states that 'any dispute that cannot be settled within a period of six months... can be referred *to the administrative courts or tribunals of the involved Contracting State* or to international arbitration.'<sup>170</sup> (Emphasis added). Through this clause, it is clear that the contracting state is expressly recognizing the public-law function of these two mechanisms to settle regulatory disputes between the state and private individuals. Moreover, special attention should be drawn to the evidence related to this practice that is also found in those treaties in which contracting states have consented to include, within the definition of 'investment', rights granted by administrative acts such as licences, permit, concession, etc.<sup>171</sup>

It is obvious that contracting states of a BIT are (consciously or unconsciously) giving their consent to create this kind of temporary supranational tribunal. For this reason, it can be a healthy exercise to refrain from isolating such functions from the application

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<sup>170</sup> Translated into English by the Author.

<sup>171</sup> See, e.g., article 1 (a) (v) of the Germany-Trinidad and Tobago BIT; article 1 (a) (v) of the China-Bahrain BIT; article 1 (d) of the Venezuela-Vietnam BIT; article 1 (e) of the Venezuela-Belarus BIT; article 1 (a) (v) of the Venezuela-Barbados BIT; article 1 a) (v) of the USA-Argentina BIT; article 1 (a) (v) of the USA-Ecuador BIT; article 1 (a) (vi) of the USA-Panama BIT; article 1 (e) of the Colombia-Peru BIT; article 1 (e) of the Colombia-Switzerland BIT; article 1 a) v) of the Colombia-UK BIT; and article 1) (2) (c) e) of the Colombia-Spain BIT.

of some domestic (administrative) law principles since these are the legal principles that govern the regulatory behaviour of the state as well as the relationship between the state and private individuals (including foreign investors) at the national level. As already emphasised, given the analogy between ISTAs and domestic administrative tribunals/courts in reviewing the administrative action of the state, in addition to the consent of the host state to arbitrate public-law matters, it is noteworthy highlight that the main role of these two public-law adjudicatory mechanisms is to control the legality of the state's regulatory conduct. In this regard, these two parallel mechanisms of reviewing the regulatory conduct of the state should carry out the control of legality in order to find out whether the state's administrative action was also performed not only in accordance with the those administrative law principles that rule the regulatory conduct of the state (see sub-section f of chapter II), but also in accordance with the public interest.

Support for this proposition can be found in *International Thunderbird Gaming Corporation v. Mexico* where, in a separate opinion, Professor T. Wälde stated that ‘... *investor-state arbitration are [analogous to the]...judicial review relating [to] governmental conduct* – be it international judicial review (as carried out by the WTO dispute panels and Appellate Body, by the European – or Inter-American Human Rights Courts or the European Court of Justice) *or national administrative courts judging the disputes of individual citizens’ over alleged abuse by public bodies of their governmental powers.*’<sup>172</sup> (Emphasis added).

In this respect, slowly but surely, there is a growing need to take public law principles into consideration in treaty-based state-investor arbitrations . This can be illustrated by

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<sup>172</sup> See, e.g., S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010). See also C. A. Rogers, and R. P. Alford, *The Future of Investment Arbitration* (Oxford University Press, UK, 2009).

the fact that since 2000 arbitral tribunals, in relation to regulatory disputes started to take into account public law principles due to the consideration of the FET standard in investment arbitrations. This necessity is making its way to the top of the current discussion on the legitimacy of the investment treaty arbitration system.<sup>173</sup> Moreover, the author is of the opinion that this approach of considering some principles of domestic administrative law in international regulatory disputes represents a temporary measure to achieve a fairer balance between the host state's and foreign investor's interests at the international level.

Finally, this analogical practice can be the reason why administrative law principles can be constantly in conflict with principles of investment law<sup>174</sup> as was pointed out in subsection (v).<sup>175</sup> This is so because both are legal principles that are created in accordance with the state's intention and related to the state's regulatory conduct. The risk of applying this proposal to regulatory disputes may create a conflict of principles that may be interpreted and applied by international arbitrators who may be inexperienced in public-law matters.<sup>176</sup> This lack of public-law practice results in taking a short-cut with regard to considering domestic law principles as facts alleged by the parties.<sup>177</sup>

#### viii. Analogy with administrative justice.

The introduction of treaty-based investor-state arbitration within a state's public-law apparatus, as a mechanism to administer justice, represents the reality of finding a solution to the overcrowded national judicial system. However, the administration of

<sup>173</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 5, on paragraph 13.

<sup>174</sup> See F. G. Jacobs, and S. Roberts, *The effect of Treaties in Domestic Law* (United Kingdom National Committee of Comparative Law, Sweet & Maxwell, London 1987), on page 58.

<sup>175</sup> See for more details the next sub-section (b) regarding 'Applicable Law'.

<sup>176</sup> See, e.g., Wälde, *supra* note 9, on page 28, in which Professor Wälde pointed out that '*there are few if any experts in comparative public law...*'

<sup>177</sup> See, e.g., Z. Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureka and Methanex*, *Arbitration International*, Vol. 22, No. 1 (2006), on page 45.

justice cannot be discarded from the main objective of the state's judicial function which is to guarantee the correct application of the principle of legality and the due observance of the law, including the control of those legal acts performed by the state.<sup>178</sup> The judicial control of state acts (i.e., administrative acts) and its interaction with private individuals is part of what has become domestically known as 'administrative justice'.<sup>179</sup>

Regarding this latter point, there may be a growing concern in the public-law sector about the judicial control of these types of state acts by arbitral tribunals and how this affects the competence of national tribunals and courts.<sup>180</sup> This concern may be due to the main aim of the state's judicial control which is to guarantee the effectiveness of the principle of legality. This idea may also embrace the idea on the 'democratic legitimacy' of arbitral practises regarding the review of state regulatory actions at an international level.<sup>181</sup>

In addition, there is also the fact that it is only through the application of this principle that the equilibrium between public authorities and private individuals can be reached.<sup>182</sup> The application of this principle is the safety tool to control the public authorities' powers at an international level and to determine the state's reasonability.<sup>183</sup> In particular, the different manners of how the state (i.e., public administration) can substantiate its will through administrative acts are taken into consideration. Hence, the substantiation may imply a breach of an IIT's provisions.

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<sup>178</sup> See Jacobs and Roberts, *supra* note 174, on page 58.

<sup>179</sup> See, e.g., C. Sarria Olcos, *Justicia Administrativa en Colombia*, Jornadas Colombo-Venezolanas de Derecho Publico, Universidad Externado Colombia (1995), pages 921-974, on page 950.

<sup>180</sup> See Brownlie, *supra* note 22, on page 331.

<sup>181</sup> See Sornarajah, *supra* note 15, on page 343.

<sup>182</sup> See, e.g., Sarria Olcos, *supra* note 179, on page 950.

<sup>183</sup> See P. Reuter, *Introduction to Law of Treaties* (Kegal Paul International, London and New York, 1995), on page 38.

In this context, it is noteworthy to highlight the role of judges on the positioning of investment treaties within a state's legal system (see Chapter III). In this respect, unlike the French Legal system, under the British Legal system, treaties do not have a special position,<sup>184</sup> i.e., treaties and legislation are 'on the same level'.<sup>185</sup> This latter observation may represent an important legal challenge for domestic courts when dealing with the interpretation of treaties at the local level.

Finally, it has been highlighted that within the 'the new supranational projections [of a state], especially those regarding economic aspects, there has arisen new views on the public law [functions] in order to avoid that such a public law framework becomes an obstacle for the development and regional integration.'<sup>186</sup> In this respect, it has been argued that these supranational actions of the state have to be in line with the principles of domestic law and international law, in which case the state must ensure the incorporation of a mechanism to judicially control the state's regulatory behaviour within a given treaty's provisions.<sup>187</sup>

### **c. Applicable Law**

Generally, within BIT provisions, the applicable law to investor-state disputes (including regulatory disputes) is established in an express clause/article which determines the contracting states' election of the appropriate law. For example, in article 9(5) of the Venezuela-Netherlands BIT, it was stated that an arbitral award should be based on (i) the law of the contracting party concerned; (ii) the provisions of the BIT and other relevant agreements between the contracting parties; (iii) the

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<sup>184</sup> Here, the principle of 'Parliamentary Supremacy' must be recalled which allows legislation to be passed even if it could be inconsistent with given treaty obligations. However the use of the principle in this manner would be unlikely. See, e.g., A. W. Bradley, and K. D. Ewing, Constitutional and Administrative Law (Fourteenth Edition, Pearson Longman, England 2007), on pages 7 and 55.

<sup>185</sup> See Jacobs and Roberts, *supra* note 174, on page 58.

<sup>186</sup> See Sarria Olcos, *supra* note 179, on page 958.

<sup>187</sup> *Ibid.*, on page 958.

provisions of special agreements relating to the investments; (iv) the general principles of international law; and (v) such rules of law as may be agreed by the parties to the dispute.

The majority of the investor-state dispute clauses incorporated into an IIT by the contracting states include a list of alternative arbitral institutions and rules to settle a possible legal controversy between the two parties. This list of alternatives mostly either refers to the rules of (i) the ICSID Convention; (ii) the Additional Facility of the ICSID; (iii) the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); and (iv) any other arbitration institution as agreed by the parties to the dispute.<sup>188</sup>

The two most popular institutions and rules chosen by the conflicting parties are the ICSID Convention and UNCITRAL rules. In fact, nowadays, the most popular one to deal with investment treaty disputes is the ICSID Convention<sup>189</sup> since it has been said that its jurisdiction must be founded on an IIT.<sup>190</sup> In this regard, the applicable substantive law to any treaty-based investor-state legal controversy mainly refers to, and is based on, the rules contained in article 42 of the ICSID Convention.<sup>191</sup>

Article 42 of the ICSID Convention states: ‘*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.* In the absence of such agreement, the Tribunal *shall apply the law of the Contracting State party to the*

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<sup>188</sup> See, e.g., Article 13 (3) of the Germany-Trinidad & Tobago BIT; Article 9 (3) of the Bulgaria-China BIT; article 9 (3) of the China-Bahrain BIT; article 8 (2) of the Venezuela-Vietnam BIT; article 8 (2) of the Venezuela-Belarus BIT; article 8 (2) of the Venezuela-Barbados BIT; article VII (3) of the Argentina-USA BIT; article VI (3) of the USA-Ecuador BIT; article 12 (2) of the Colombia-Peru BIT; article 11 (2) of the Colombia-Switzerland BIT.

<sup>189</sup> See ICSID Case Load – Statistics (issue 2011-1), on page 7, Total of number of ICSID cases registered by year, <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English11>> (Last visit 03/03/2011).

<sup>190</sup> See *Pantechniki v. Albania* (2009), supra note 4, on paragraphs 64.

<sup>191</sup> For an extensive explanation of the meaning of ‘applicable law’ under the scope of article 42 of the ICSID Convention see Schreuer, Malintoppi, Reinisch, and Sinclair, supra note 20, pages 545-639. See also Douglas, supra note 63, on page 42.



*dispute* (including its rules on the conflict of laws) and such *rules of international law as may be applicable*.’ (Emphasis added).

Thus, as can be seen in article 42, a hierarchical order can be deduced to determine the applicable law to a given treaty-based controversy.<sup>192</sup> Firstly, the duty of applying the law agreed by the parties, e.g., through an IIT or an investment contract (based on the principle of party autonomy and freedom of choice). Secondly, there is the duty of applying by default the law of the contracting party to the dispute (i.e., the host state’s law) and rules of international law ‘as may be applicable’. Under both cases, the most frequent arbitral practice has been the application of the law of the state party to the dispute together with international law.<sup>193</sup> It has been said in this regard that Article 42 (1) of the ICSID Convention allows (confirms) the application of *various sources of law* to resolve the issues in dispute.<sup>194</sup>

Nonetheless, it is of significance to draw attention to the fact that the drafters of the ICSID Convention have just referred to ‘law’ in a general manner and as a general concept. They neither specify nor classify the host state’s law in either applicable principles or non-applicable principles. Hence, it has been said that the ICSID Convention ‘does not provide substantive rules for the relationship between host States and foreign investors’<sup>195</sup> as well as that ‘Article 42(1) leaves open the circumstances in which national law is to be applied’.<sup>196</sup> For this reason, it can be assumed that the exercise of applying principles from domestic law to international regulatory disputes

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<sup>192</sup> For a detailed explanation of the different approaches to the applicable law to investment disputes see Douglas, *supra* note 63, pages 39-133.

<sup>193</sup> See Schreuer, Malintoppi, Reinisch, and Sinclair, *supra* note 21, on pages 561 and 576.

<sup>194</sup> See Douglas, *supra* note 63, on pages 42 and 44.

<sup>195</sup> See Schreuer, Malintoppi, Reinisch, and Sinclair, *supra* note 21, on page 550.

<sup>196</sup> *Amco v Indonesia No. 2 (Merits)* 1 ICSID Rep 569, quoted by Douglas, *supra* note 63, pages 69-72 and 133.

has been left to the discretion and expertise of investment arbitrators (arbitral tribunals).<sup>197</sup>

For example, the arbitral practices in determining the rule of law for particular arbitral cases<sup>198</sup> range from (i) the simple application of the host state's law<sup>199</sup> to (ii) the combined application of host state's law and international law;<sup>200</sup> and to (iii) the sole application of international law.<sup>201</sup>

This serves to emphasize that in current arbitral practice, there does not seem to be a homogeneous criterion used to determine the applicable law to the investor-state dispute. In practice, there is wide discretion on the arbitrators' side.<sup>202</sup> It has been said that '[an arbitral] tribunal is competent to apply the stipulated sources of law' as well as that '[the arbitral tribunal has the power] to apply different rules from different legal sources to different issues in dispute'.<sup>203</sup> The presence of such discretion seems to discard *a priori* some legal tools that may be used as a good reference to help solve an international regulatory controversy.<sup>204</sup> This is supported by the fact that these international arbitrators do not refer sufficiently to domestic law, including its legal principles and the years of experience that the main legal systems have in dealing with

<sup>197</sup> See Douglas, *supra* note 63, on pages 40 and 132.

<sup>198</sup> For a specific explanation and cases regarding this arbitral practice, see Doak Bishop, Crawford and Michael Reisman, *supra* note 28, pages 623-757.

<sup>199</sup> See, e.g., *Aguaytia Energy LLC v. Republic of Peru* (ICSID Case No. ARB/06/13) December 11, 2008 – Final Award, on paragraph 74; and *Antoine Goetz et. Al v. The Republic of Burundi* (ICSID Case No. ARB/95/3) February 10, 1999 – Final Award, paragraph 98.

<sup>200</sup> See, e.g., *AUCOVEN v. Venezuela* (2003), *supra* note 119, paragraph 105; *Azurix v. Argentina* (2006), *supra* note 47, paragraph 67; *Occidental v. Ecuador* (2004), *supra* note 99, paragraph 93; *Helnan International Hotels A/S v. The Arab Republic of Egypt* (ICSID Case No. 05/19) July 3, 2008 – Final Award, paragraph 102; and, *Phoenix Action, LTD v. The Czech Republic* (ICSID Case No. ARB/06/5) April 15, 2009 – Final Award, paragraph 52.

<sup>201</sup> See, e.g., *Metalclad v. Mexico* (2000), *supra* note 93, paragraph 70; *Santa Elena v. Costa Rica* (2000), *supra* note 102, paragraph 65; *Thunderbird v. Mexico* (2006), *supra* note 91, paragraph 89; and *MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile* (ICSID Case No. ARB/01/7) May 25, 2004 – Final Award, paragraph 87.

<sup>202</sup> See Doak Bishop, Crawford and Michael Reisman, *supra* note 28, on page 630.

<sup>203</sup> See Douglas, *supra* note 63, on pages 42 and 44.

<sup>204</sup> A good example of this can be found in the Decision on Annulment in *Amco v. Indonesia* where a part of the award was annulled because the arbitral tribunal did not take into consideration a fundamental provision of Indonesian law. Case quoted by Schreuer, Malintoppi, Reinisch, and Sinclair, *supra* note 21, on page 555.

regulatory disputes between the public administration (i.e., the state) and private individuals (i.e., including foreign investors). In particular, if one takes into consideration the facts asserted in sub-section (vi), the analogy that exists between these kinds of domestic state-private individual disputes and those international treaty-based regulatory disputes. This particular consideration serves to infer that the former can be used as a legal reference to help arbitrators to deal with latter type of regulatory dispute.

The Oxford English Dictionary defines ‘law’ as ‘a rule or system of rules recognized by a country or community as governing the actions of its members.’ and the Oxford Dictionary of Law further refers to it as ‘[t]he enforceable body of rules that govern any society.’ Based on these two definitions of ‘law’, it could be asked whether the notion of ‘law’ mentioned by the ICSID’s drafters may also include the application of or reference to general principles of law that have been developed domestically through case law and applied to investor-state arbitration practices which deal with international regulatory disputes. This particular point has a special importance within this study due to the case law nature that international investment law has (which is similar to the case law nature of domestic administrative law).<sup>205</sup>

Under both the British and French legal systems, these domestic legal principles have been used as a good reference by administrative tribunals and courts in an attempt to deal with the legal/regulatory differences that have arisen between the public administration and private individuals for over seventy-five years. It is worth mentioning here that the similarity between the case law natures of both the domestic

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<sup>205</sup> J. P. Commission, *Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence*, Journal of International Arbitration 24 (2); 129-158 (2007), on page 132.

administrative law and investment law principles ought to make domestic administrative law principles more relevant for ISTA.

Additionally, there is the fact that arbitral tribunals have taken account of the increasing necessity of relying on, or referring to, domestic law principles as kind of legal guideline to try to resolve the dispute.<sup>206</sup> The question that may be asked is whether these legal principles can be a useful reference for investment arbitrators when dealing with a treaty-based regulatory dispute. Particularly, if this practice is considered to be a mechanism that may help to minimize the risk of nullity of the resulting award,<sup>207</sup> as well as to increase the legitimacy of the investment arbitration system.<sup>208</sup> Furthermore, it recently has been stated that ‘[t]he future evolution of [BIT] jurisprudence will mainly depend upon the methodology... [that arbitral] tribunal[s] use to apply the relevant rules of investment law’.<sup>209</sup>

#### **d. Principles of Administrative Law as a legal reference for Investment Arbitrators**

In the exercise of determining the applicable law relevant to a particular investor-state regulatory controversy, investment arbitrators have recently started (from around the year 2000 onwards) to look for and rely more on non-international rules and principles to carry out this task of judging the regulatory conduct of the host state at the international level due to the application of the FET standard in investment arbitration. These non-international sources have mainly been found in, and taken from, domestic legal sources such as legislative and administrative acts,<sup>210</sup> i.e., from the domestic

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<sup>206</sup> See, e.g., *Mobil v. Venezuela* (2010), supra note 8, paragraph 81; *Azurix v. Argentina* (2006), supra note 47, paragraph 67; *Occidental v. Ecuador* (2004), supra note 99, paragraphs 58 and 137; and *Pantechniki v. Albania* (2009), supra note 4, paragraphs 69.

<sup>207</sup> See Schreuer, Malintoppi, Reinisch, and Sinclair, supra note 21, on page 554.

<sup>208</sup> See Sornarajah, supra note 15, on page 343.

<sup>209</sup> See Dolzer, supra note 80, on page 970.

<sup>210</sup> See Jaffe Carbonell, supra note 65, on page 98.

regulation of the host state.<sup>211</sup> In many arbitral proceedings, the most popular and traditional practice of relying on such domestic acts has come to pass through the use of legal experts declarations and affidavits.

It is important to emphasize, in recent arbitral awards, some investment tribunals, along with some arbitrators, have already started to expressly recognise the need of solving investor-state regulatory controversies by resorting to domestic law and its principles. This growing need has mainly been based on the fact that there is a lack of rules governing the unilateral acts of states in international law<sup>212</sup> and also on the fact that customary international law and international investment law are both constantly evolving.<sup>213</sup> This constant evolution is not only apparent in these two areas of law; it is also found in any democratic society and its domestic administrative law.

For example, in *International Thunderbird Gaming Corporation v. Mexico*, in a separate opinion referring to legitimate expectations, one of the arbitrators, Professor Tomas W. Wälde asserted that ‘[t]he common principles of the principal administrative legal systems are in [his] view an *important point of reference* for the interpretation of investment treaties to the extent investment treaty jurisprudence is not yet firmly established.’<sup>214</sup> (Emphasis added).

Moreover, the decision on jurisdiction in *Mobil Corporation et al v. Venezuela* emphasized that ‘[r]ules governing State’s unilateral acts in international law have never been codified and remain controversial on a certain number of points.’ It is important to stress that the uncodified rules regarding a state’s regulatory conduct are

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<sup>211</sup> See, e.g., *Mobil v. Venezuela* (2010), supra note 8, paragraph 81; *Azurix v. Argentina* (2006), supra note 47, paragraph 67; *Occidental v. Ecuador* (2004), supra note 99, paragraphs 58 and 137; and *Pantechniki v. Albania* (2009), supra note 4, paragraphs 69.

<sup>212</sup> See, e.g., *Mobil v. Venezuela* (2010), supra note 8, paragraph 87.

<sup>213</sup> See, e.g., *Waste v. Mexico* (2004), supra note 96, paragraph 92.

<sup>214</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, supra note 5, paragraph 28.

not only of international legal concern, but also of national concern. This is why, for decades, domestic legal systems such as the British and French administrative legal systems have relied on case law when dealing with domestic individual/state legal/regulatory disputes.

Both the French and British administrative legal systems currently lack a determined administrative law code. Instead they are based on legal precepts that are dispersed in various legislative and administrative acts which are used and interpreted on a case-by-case basis. As was described in Chapter II, the lack of an administrative law code may be based on the idea of freely promoting the host state's public interest, in addition to giving the public administration a certain flexibility to adapt its activities to cope with the vivid, dynamic and changing realities it has to face, particularly in cases that could not have been foreseen in advance.

With regard to the possible occurrence of unforeseen domestic changes in a host state, the final award in *MTD v. Chile* is relevant. In this case, the arbitral tribunal expressly recognised that '[an IIT provision] does not entitle an investor to a change of the normative framework of the country where it invests. *All that an investor may expect is that the law be applied.*'<sup>215</sup> (Emphasis added). Furthermore, the arbitral tribunal is simply referring to freedom of the host state to adopt new policies but with due observance of the law (i.e., subject to the principle of legality). Finally, the arbitral tribunal concluded that the freedom to adopt new policies was not contained by any provision of the BIT.

It is important here to highlight the proposal formulated by W. Burke-White and A. Von Staden on the need to consider public law standards of review in investor-state

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<sup>215</sup> See, e.g., *MTD v. Chile* (2004), *supra* note 200, on paragraph 205.

arbitration as ‘a margin of appreciation standard of review’ before the existing strict ‘no other means available’ approach applied in the current arbitral practice.<sup>216</sup>

The practice of investment arbitrators to refer to administrative law principles in international regulatory disputes may help to mitigate the risk of considering a host state’s regulatory conduct as a potential international breach of an IIT provision. An example of such a risk can be found in *Waste Management, Inc. v. Mexico*, where the arbitral tribunal stated that ‘a unilateral and unjustified change in the exclusivity obligation could have amounted to an expropriation’.<sup>217</sup> Again, the evaluation of the host state’s regulatory conduct represents a legal conflict between international and national principles, owing to the fact that the disputed host-state measure can be completely legal and justified under its national legal system but may not be under the minimum international standards of treatment.

Hence, the role of investment arbitrators as public-law adjudicators is crucial in assessing the state’s regulatory conduct. This is particularly so if this regulatory behaviour also contains elements or aspects of the host state’s administrative, labour, monetary, and penal law.<sup>218</sup> The main concern here will be the fact that many of these areas are constitutionally reserved to the host state and cannot be waived contractually.<sup>219</sup>

The words of the sole arbitrator Professor Jan Paulsson in the case of *Pantechniki S.A. Contractors & Engineers* may be influential to the application of administrative law principles to international investor-state regulatory disputes. In this respect, Professor

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<sup>216</sup> It was emphasized that ‘any move by ICSID tribunals towards a consistent and coherent standard of review appropriate for the context of public law disputes... would increase the investor-state arbitration system’s overall legitimacy’. See Burke-White and Von Staden, *supra* note 9, on page 719.

<sup>217</sup> See, e.g., *Waste v. Mexico* (2004), *supra* note 96, paragraph 161.

<sup>218</sup> See Schreuer, Malintoppi, Reinisch, and Sinclair, *supra* note 21, on page 565.

<sup>219</sup> *Ibid.*, on page 565.

Jan Paulsson reflected on the risk of transforming arbitral tribunals into ‘policy-makers’ when dealing with the definition of the ‘foreign investment’. He further recognized that there was a risk of introducing, to the analysis of the case, elements of ‘subjective judgment’ when dealing with characteristics of investment such as ‘sufficient duration or magnitude or contribution to economic development’.<sup>220</sup>

It can be stated that Professor Jan Paulsson’s observations serve as evidence of the investment arbitrators’ awareness of their role as public-law adjudicators and their task of dealing with issues related to the host state’s public policy and regulatory power when attempting to resolve an investor-state legal dispute. This exercise represents legal grounds either to get deeper into the analysis and solution of the case or to simply declare that the investment tribunal lacks the necessary jurisdiction.

Similarly, consideration must be given to the undeveloped mode of application of the principle of restrictive immunity.<sup>221</sup> This is based on government’s acts known as *Acta Jure Imperii* (i.e., sovereignty/acts of authority) and government’s acts by right of management that belong to the state known as *Acta Jure Gestionis* (i.e., private/commercial acts).<sup>222</sup>

Obviously, it is also of importance to draw attention to the fact that the exercise of referring or resorting to domestic law principles to attempt to resolve international investor-state regulatory controversies does not mean that the arbitral tribunal is going to review decisions deriving from the domestic courts (i.e., as an international *De Novo Review*). Reference to these legal principles can be carried out when the investor has opted for international arbitration and has decided to abandon the option of going to a

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<sup>220</sup> See, e.g., *Pantechniki v. Albania* (2009), *supra* note 4, paragraph 43.

<sup>221</sup> See Brownlie, *supra* note 22, on page 333.

<sup>222</sup> *Ibid.*, pages 327-328.



national court to claim a breach of an IIT's provision or when there has been a denial of justice on the part of the host state. Finally, it must be stressed that the present idea will not be very practical or useful if the disputing parties have agreed to resolve their controversy through *ex aequo et bono* (according to equity and good conscience) basis.<sup>223</sup>

#### **e. Stages of the arbitration process**

Once the foreign investor has opted for international arbitration as a forum to resolve a legal dispute with a host state, the investor, in most cases, chooses the ICSID Convention (i.e., an institutional arbitration). Such a choice includes the submission of both disputing parties to this institution's rule.

In accordance with the ICSID Convention, its rules can be divided and allocated into two main stages.

The first stage can be referred to as 'the cognitive stage'. This stage includes all the steps prior to the final award being delivered and that are destined to obtain a complete understanding of the case. This cognitive process is undertaken by means of the following steps (i) request for arbitration;<sup>224</sup> (ii) constitution of the Tribunal;<sup>225</sup> and (iii) powers and functions of the Tribunal.<sup>226</sup>

The second stage can be referred to as 'the enforcement stage'. This phase is made up of all the steps destined to guarantee the final result – the proper administration of

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<sup>223</sup> See C. B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction* 41 Vand. J. Transnat'l L. 1083 (2008), on page 1093.

<sup>224</sup> Article 36 of the ICSID Convention.

<sup>225</sup> Articles 37-40 of the ICSID Convention.

<sup>226</sup> Articles 41-47 of the ICSID Convention.

justice. The main phases of this stage are: (i) the award;<sup>227</sup> (ii) interpretation, revision and annulment of the award;<sup>228</sup> and (iii) recognition and enforcement of the award.<sup>229</sup>

One of the most relevant or important phases of arbitration proceedings is the recognition and enforcement of the award due to the fact that it represents the final stage of any international legal dispute.<sup>230</sup> The ICSID Convention states, in article 54, that its awards have to be recognized as though they were final judgements of the host state's national court and, therefore, they may be considered to be insulated from revision by any host state's domestic court.<sup>231</sup>

To this respect, article 54 establishes that:

*[E]ach contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State.*

...

*Execution of the award shall be governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought.*  
(Emphasis added).

Upon reading the provision contained in article 54, it can be clearly deduced that the intention and subsequent consent given to the ICSID Convention by the contracting parties (i.e., the states) was to give recognition to any ICSID's arbitral award as if it were rendered by their national courts. This recognition is a 'distinctive feature'<sup>232</sup> of the ICSID Convention and represents, as was emphasized by Professor Gus Van Harten and Professor Martin Loughlin in their article on *'Investment Treaty Arbitration as a*

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<sup>227</sup> Articles 48 and 49 of the ICSID Convention.

<sup>228</sup> Articles 50-52 of the ICSID Convention.

<sup>229</sup> Articles 53-55 of the ICSID Convention.

<sup>230</sup> See, e.g., Schreuer, Malintoppi, Reinisch, and Sinclair, *supra* note 21, on page 1117.

<sup>231</sup> See Van Harten and Loughlin, *supra* note 5, on page 135.

<sup>232</sup> See, e.g., Schreuer, Malintoppi, Reinisch, and Sinclair, *supra* note 21, on page 1117.

*Species of Global Administrative Law*,<sup>233</sup> the overcoming of previous enforceability obstacles (such as issues related to a host state's immunity), as well as representing 'an exceptionally powerful method of enforcement' due to the fact that this provision, in conjunction with the content of the New York Convention, was ratified by 'approximately 165 states'.<sup>234</sup> Nonetheless, it has been argued that the execution of an arbitral award is still subject to national law, including immunity defences.<sup>235</sup> In this particular regard, it has been distinguished from the enforcement and the execution of arbitral awards.<sup>236</sup> Due to the size of the present research, the study of this latter point is beyond the scope of this thesis, and consequently will not be addressed.

#### **f. Summary**

Treaty-based investor-state arbitration is a mechanism used to adjudicate public-law issues and fulfils the intention of the contracting states to create a special international forum to resolve disputes that arise from a treaty-based disagreement between a contracting state and a national of the other contracting party. Recently, one of the main reasons for investor/state treaty arbitration is the review of the administrative actions of the host state at the international level. The review of administrative actions of the host state gives ISTAs the characteristic of being considered as international regulatory disputes.

The analogy of investor-state arbitration mechanisms with institutions and principles of domestic administrative law creates a new point of legal reference for those investment

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<sup>233</sup> Published in EJIL (2006) Vol. 17 No. 1, 121-150. See also E. Baldwin, M. Kantor, and, M. Nolan, *Limits to Enforcement of ICSID Awards* 23(1) Journal of International Arbitration (2006), pages 1-24.

<sup>234</sup> See, e.g., Van Harten and Loughlin, *supra* note 5, on page 134; and Schreuer, Malintoppi, Reinisch, and Sinclair, *supra* note 20, pages 1115-1150.

<sup>235</sup> See Baldwin, Kantor and, Nolan, *supra* note 233, on page 5.

<sup>236</sup> See, for more details, Baldwin, Kantor and, Nolan, *supra* note 233, pages 4-9. In this article, the authors have cited some legal cases where the courts have made this particular distinction between enforcement and execution.

arbitrators that are currently dealing with international regulatory disputes. Such reference should not only be based on the existing similarity between the characteristic functions of investor-state arbitration tribunals and domestic administrative tribunals and courts, but also on the approach that these domestic tribunals and courts take in dealing with similar regulatory situations that coincidentally involve the state (through its public administration) and private individuals (including foreign individuals).

It is of paramount importance to reiterate that the British and French administrative legal systems have more than seventy-five years of rich experience dealing with this type of regulatory dispute. During these years of experience, a large number of principles have subsequently been developed and expanded upon through case law (for some of them see Chapter II). This proposal (of referring to principles of administrative law) seems to have no legal impediment which would prohibit its application, it should be considered by investment arbitrators when they are reviewing the regulatory conduct of the host state at the international level in accordance with the FET standard.

Moreover, reference to these institutions and principles can bring more legitimacy to the growing system of investment arbitration. This is particularly so if the public law principles that govern the regulatory conduct of the state have not been well developed and made available in international law.<sup>237</sup> Lastly attention may be drawn to the well-known principle which establishes that contracting states have the duty to ensure and guarantee *the state of law* either by investment tribunals or by domestic courts. This duty also compromises the consideration of those principles of law that give grounds to the state's regulatory behaviour either at the national level or at the international level.

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<sup>237</sup> See Adaralegbe, *supra* note 3, on page 88.

Based on the previous observations, it is opportune to highlight that the aim of next chapter will be to identify those situations, by reviewing a sample of arbitral awards, where the arbitral tribunals have referred to or have missed (directly or indirectly) the opportunity to refer to those principles developed domestically. This exercise is carried out in order to demonstrate how investment tribunals have dealt with these principles of domestic law when considering the regulatory power of the host state at the international level, particular attention will be given those cases that are largely concerned with the above-mentioned FET standard.

## CHAPTER V

### INVESTOR-STATE TREATY ARBITRATION AND PRINCIPLES OF ADMINISTRATIVE LAW – AN ARBITRAL PRACTICE REVIEW

#### a. Introduction

As mentioned in the preceding chapter, the international task of reviewing a state's regulatory conduct through *treaty-based investor-state arbitration* is a relatively new phenomenon and a growing area within the contemporary notion of public international law.<sup>1</sup> The features and functions of this new regulatory dispute resolution mechanism between private individuals and sovereign states have been considered analogous to those carried out by domestic institutions, e.g., national tribunals and courts.<sup>2</sup>

Traditionally, and for a significant period of time, these domestic institutions have resolved such regulatory disputes between the state and private individuals through the application of a set of domestic legal principles.<sup>3</sup> To reiterate, these domestic institutions and their set of principles have existed in the major legal systems of world, namely the common law and civil law systems,<sup>4</sup> for over fifty-five years.<sup>5</sup>

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<sup>1</sup> See B. Kingsbury, and S. W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality* in S. W. Schill, International Investment Law and Comparative Public Law (Oxford University Press, UK 2010), on page 75; and M. Sornarajah, The International Law of Foreign Investment (Second Edition, Cambridge University Press, UK 2004), on page 128.

<sup>2</sup> See, e.g., G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, Oxford University Press, UK 2007); G. Van Harten, and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, EJIL (2006) Vol. 17 No. 1, 121-150; S. W. Schill, International Investment Law and Comparative Public Law (Oxford University Press, UK 2010); and, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion, paragraph 13.

<sup>3</sup> See Chapters II and IV. The French Administrative Legal System, as a representative of the Civil Law tradition, goes back to the nineteenth Century; whereas the British Administrative Legal System, as a representative of the Common Law tradition, goes back to 1950's-60's, after the flexibility of Dicey's Doctrine. See also, A. G. Adaralegbe, Concurrent Jurisdiction Between Treaty and Domestic Tribunals: An Examination of Jurisdiction-Regulating Mechanisms Within the Investor-State Treaty Arbitration System and Their Effectiveness (CEPMLP, University of Dundee, PhD Thesis, 2009).

<sup>4</sup> See *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 2, paragraph 64.

It is of significance to draw attention to the fact that the analogy between the features and functions of these domestic legal review mechanisms and the mechanisms which deal with international regulatory disputes have only recently been identified.<sup>6</sup> The relevance of this academic comparison has emerged as a legal consequence of elevating the private rights of action of individuals to the international law forum through the conclusion of more than 2,750 BITs<sup>7</sup> worldwide.<sup>8</sup>

The growth in the number of BITs, in addition to the incorporation of investor-state arbitration clauses therein, has given rise to the constant scrutiny of the host state's regulatory conduct by international investment arbitrators. However, there is a point of concern between this international mechanism and traditional domestic mechanisms. This concern is based on the assumption that domestic public-law issues have been entrusted to and carried out by non-traditional or non-tenured public-law adjudicators, i.e., *international investment arbitrators*.<sup>9</sup>

Nevertheless, it should be acknowledged that both national and international dispute resolution methods have been entrusted to judges and arbitrators by sovereign states. These judges and arbitrators have been regarded as *public-law adjudicators*<sup>10</sup> to directly (and, sometimes, indirectly) assess the host state's regulatory conduct. Both mechanisms have been designed to determine and contextualize the *legality* and *fairness* of a given regulatory measure in accordance with the provisions of the relevant

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<sup>5</sup> See, e.g., A. W. Bradley, and K. D. Ewing, Constitutional and Administrative Law (Fourteenth Edition, Pearson Longman, England 2007); L. Neville Brown, and J. Bell, French Administrative Law (Fifth Edition, Oxford University Press, UK 2003); and J. Vélez García, Los Dos Sistemas del Derecho Administrativo – Ensayo de Derecho Público Comparado (Institución Universitaria Sergio Arboleda, Colombia 1994).

<sup>6</sup> See supra note 2.

<sup>7</sup> UNCTAD, *World Investment Report 2010*, The International Investment Regime, on page 81.

<sup>8</sup> See Adaralegbe, supra note 3.

<sup>9</sup> See, e.g., H. Rondon de Sanso, *Los Problemas Jurídicos planteados en los Arbitrajes Internacionales de Inversión*. <<http://www.pdvs.com/interface.sp/database/fichero/free/5001/640.PDF>> (Last visit 26/09/2009); and T. Wälde, *Review of the Book on Investment Treaty Arbitration and Public Law by Van Harten, G.*, (Unpublished).

<sup>10</sup> At the international level, based on a certain IIT; and, at the national level, based on a certain legislative act.

municipal law, the standards established by a certain BIT, and also with provisions of the law in general.

The problem with these separate (parallel) levels of review, as will be seen later, is the fact that both national and international levels are operating in a disconnected manner with regard to reviewing the regulatory power of a state.

For this reason, it is important to emphasize that, despite this disconnection, these national and international public-law adjudicators refer to and interpret the general principles of law in a similar way. For example, under both dispute resolution practices, *through a similar methodology of interpretation* e.g., case law,<sup>11</sup> adjudicators adopt different interpretations of these sets of legal principles, which have been considered to be essential legal references, in mainly attempting to resolve a particular individual/state regulatory dispute. Examples of these sets of principles are the substantive principles of administrative law (see Chapter II) and the substantive principles of international investment law (see Chapter III).

This similarity arises, from the fact that the rules governing the state's regulatory power have not been consistently codified either at the national level or international level.<sup>12</sup> Therefore, public-law adjudicators have been required to resort to these legal principles and to their various interpretations in their decisions as well as interpretations of previous tribunals and courts. For example, in some cases, investment tribunals have

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<sup>11</sup> See *Waste Management, Inc v. Estados Unidos Mexicanos* (ICSID Case No. ARB(AF)/00/3) April 30, 2004 – Final Award, paragraph 96, where the tribunal held that “‘full protection and security must be disciplined by being based on State practice and judicial or arbitral caselaw or other sources of customary or general international law.’ (Emphasis added). See also J. P. Commission, *Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence*, *Journal of International Arbitration* 24 (2); 129-158 (2007), on page 132.

<sup>12</sup> See *Mobil Corporation et al v. Bolivarian Republic of Venezuela* (ICSID Case ARB/07/27) June 10, 2010 – Decision on Jurisdiction, paragraph 87.



expressly resorted to previous arbitral decisions,<sup>13</sup> as well as to domestic tribunals and courts within their territory.<sup>14</sup> An apparent point of reconciliation between these two sets of legal practices is that, in recent arbitral practices from around the year 2000 onwards, domestic law principles have been increasingly referred to by arbitral tribunals as legal guidance to resolve the investor-state regulatory dispute, albeit in a conservative manner.<sup>15</sup>

Nevertheless, the main content of these sets of legal principles and their interpretations has been created through two *separate (parallel) manners* and *scenarios*, despite their similar main objective (i.e., to help public-law adjudicators in the process of assessing the regulatory conduct of a similar public-law subject such as *the state*). The two *separate (parallel) manners* refer to treaty-based arbitrations and national tribunals or courts, respectively.<sup>16</sup> The *two different (parallel) scenarios* refer to: at the international level, judging the state as a contracting party of an IIT (i.e., as a subject of public international law); and, at the national level, judging the state (through its public administration) as the tortfeasor (i.e., a subject of public domestic law).

Based on the previous idea, it may be affirmed – at first glance– that the separate emergence of these two sources of interpretation of the sets of principles create an *apparent* conflict between the legal principles of international investment law and those principles of national (constitutional and administrative) law e.g., the conflict between

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<sup>13</sup> See Commission, supra note 11.

<sup>14</sup> See, e.g., Neville Brown and Bell, supra note 5, pages 175-177; and Bradley and Ewing, supra note 5, pages 723-758.

<sup>15</sup> See, e.g., Mobil v. Venezuela (2010), supra note 12, on paragraph 81; Azurix Corp. v. la Republica Argentina (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award, paragraph 67; Occidental Exploration and Production Company v. The Republic of Ecuador (London Court of International Arbitration Administered Case No. UN 3467) July 1, 2004 – Final Award, paragraphs 58 and 137; Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award, paragraph 69. Moreover, it is of relevance to draw attention to the fact that that some arbitral awards have made repeated references to the principle of legitimate expectations.

<sup>16</sup> Many arbitral tribunals have emphasized that domestic court decisions are not binding on them.

some principles of domestic administrative law and the FET standard when dealing with international regulatory disputes. This conflict is possibly one of the reasons of why it has been argued that the legitimacy of the investment arbitration system could be at '*risk*'.<sup>17</sup> Specifically, if it is taken into consideration that these legal reviewing practices compromises, to some extent, the state's responsibility when foreign investment rights have been compromised by a governmental measure.<sup>18</sup>

Perhaps, the arbitral reluctance to jointly refer to these two sources of legal principles when dealing with regulatory disputes is considerably affecting the way in which investment law principles are interpreted. This reluctance is affecting and compromising the process of assessing the host state's regulatory behaviour at the international level and, consequently, the host state's international responsibility (i.e., a kind of limitation to the freedom of the state to exercise its sovereign regulatory power). To a greater extent, it is compromising and discarding *a priori* the fact that the state must act in accordance with its constitutional and legal precepts which cannot be ignored under any circumstance.

This concern acquires another special legal connotation if account is taken of the possible emergence of doubts with regard to how the scope of the substantive principles of international investment law can coexist with the scope of some principles of domestic administrative law. In this respect, it is important to stress that this legal clash

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<sup>17</sup> See, e.g., M. Sornarajah, *The Clash of Globalisations and the International Law on Foreign Investment* (Centre for Trade Policy and Law, Ottawa) <<http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf>> (Last visit 07/04/2009). See also P. Muchlinski, '*Caveat Investor*'? *The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, ICLQ vol 55, July 2006, pp 527-558. <[www.HeinOnline.com](http://www.HeinOnline.com)> (Last visit 29/10/2009/), on page 557.

<sup>18</sup> The activation of these two legal systems, the French or British legal systems, is mainly based on the effect that a particular regulatory measure (taken by a host state) may have on the rights of private individuals or corporations.

also creates certain political concerns from developing countries about the current investment arbitral practices (see Chapter VI).<sup>19</sup>

Domestic public-law principles and practices, developed by domestic institutions, are not significantly taken into consideration by international arbitrators when dealing with the legal consequences produced by the adoption of a host state's regulatory measure. Thus, a particular concern could arise when investment tribunals are faced with the need of addressing an individual/state regulatory dispute in accordance with the '*state/state-agreed*' international treaty standards such as the FET standard.

The author is of the view that, referring to domestic law principles<sup>20</sup> cannot only bring a source of well-established points<sup>21</sup> of reference to deal with the regulatory conduct of the state – in a more transparent and predictable way; but it can also bring a higher level of legitimacy to the highly criticized but expanding system of investment treaty arbitration. Nonetheless, the author considers it prudent to emphasize that the discussion on the specific conflict and coexistence of international and national legal principles is beyond the scope of the present study and perhaps could be the objective of another thesis.

As far as this research is concerned, the author's intention is to identify and describe, through the review of arbitral awards, those factual cases where arbitral tribunals have referred (directly and/or indirectly) to factual situations that may be framed within the scope of the main principles of domestic administrative law. This academic exercise will be undertaken through the methodology explained in the following sub-section.

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<sup>19</sup> Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009 <[http://www.thedti.gov.za/ads/bi-lateral\\_policy.pdf](http://www.thedti.gov.za/ads/bi-lateral_policy.pdf)> (Last visit 03/10/2009).

<sup>20</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 2, paragraph 28, where the dissenting arbitrator stated that 'The common principles of the principal administrative law systems are in my view an important point of reference for the interpretation of investment treaties...'

<sup>21</sup> See Wälde, *supra* note 9.

### **b. Review of Arbitral Awards – Methodology**

One of the most complex legal tasks for any public-law lawyer is to determine, with clear precision and through a precise list, the full inventory of domestic administrative law principles and their relevant scopes. The difficulty of this task is due to the fact that most of these principles are dispersed into many legislative, judicial and administrative acts. Conversely, this same difficulty does not exist in international investment law, owing to the fact that the substantive principles are listed, identified and defined *in advance* by the contracting states throughout the full text of any BIT.

However, despite this difference, a common concern emerges regarding the scope and interpretation of each independent principle belonging to each set of (administrative and investment law) principles, due to the separate (parallel) manners and scenarios surrounding their interpretation, in addition to the varied types of interpretations that exist on the content and scope of each principle. This latter legal complexity could become more difficult when a legal or academic need arises which requires a clear determination of the boundaries and scopes of each principle. Hence, this difficulty does not only exist within the realm of domestic administrative law principles, but also within the realm of international investment law principles.

Perhaps the main reason for this legal or academic complexity is not only due to the existence of an interconnection between legal principles, which happens at both the national and international levels, respectively, but also due to the existence of a great variety of interpretations that have been given to the scope of each principle through various legal decisions, both at the national and international levels respectively. The variety of interpretations of each principle serves to infer that many of these principles

are still not recognised as '*stand alone*' grounds for the legal review of the regulatory conduct of a state, either at the national or international level.

Bearing these ideas in mind, the author has decided to undertake the present research by grouping the most relevant principles of domestic administrative law into three main groups. The structural sequence of these groups of principles conforms to the idea of identifying the existence of some arbitral practices where investment arbitral tribunals have referred (directly and/or indirectly) to factual situations that can be framed within the scope of some principles of domestic administrative law. This exercise also includes those cases where the arbitral tribunal has missed the opportunity to address or to refer to such domestic administrative law principles.

The first group of arbitral awards to be analyzed will deal with awards where arbitral tribunals seem to be referring to the principle of legality. The second group will refer to awards where arbitral tribunals have addressed factual situations that can be framed within the scope of the principle of the public administration's discretionary power. Within this second group, other related principles have also been considered due to the interconnected nature of these principles. These related principles are: (i) the principle of proportionality; (ii) the principle of equality before the law; (iii) the principle of the public administration's good faith; and, (iv) the principle of the duty to give reasons. Finally, the third group embraces the principle of legal certainty and legitimate expectations. The reason for not incorporating this latter group into the previous two groups of principles, and leaving it to the end of this chapter, conforms to the assumption that many arbitral tribunals have taken this principle (in particular) to be the only existing principle of domestic (constitutional and administrative) law and have

therefore considered it to operate in an isolated manner from the rest of the domestic administrative law principles.<sup>22</sup>

This exercise will be undertaken through a review of a sample of approximately forty arbitral awards<sup>23</sup> (including preliminary and final awards) which have been selected by taking into the manner in which arbitral tribunals deal with the exercise of the host state's regulatory power at the international level in accordance with international investment standards such as the FET standard. However, it is not the intention of the author or of this chapter to undertake a detailed study of how principles of administrative law and principles of investment law coexist. Conversely, the intention of this chapter is to provide an academic exercise that can help public-law adjudicators to carry out the sensitive task of administering justice in a predictable and transparent manner; and perhaps, by doing so, it may bring more legitimacy to investment arbitral decisions, as well as to the investment arbitral system.

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<sup>22</sup> See, e.g., E. Snodgrass, *Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle*, Vol. 21. No. 1 ICSID Review – Foreign Investment Law Journal (Spring 2006), pages 1-58.

<sup>23</sup> Tecmed v. Mexico (2003) Final Award; CMS v. Argentina (2005) Final Award; Mobil v. Venezuela (2010) Decision on Jurisdiction; Nova Scotia v. Venezuela (2010) Decision on Jurisdiction; Nova Scotia v. Venezuela (2010) Laudo sobre Costas; Aconquija and Vivendi v. Argentina (2010) Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007; Occidental et al v. Ecuador (2007) Decision sobre Medidas Provisionales; MTD et al v. Chile, Decision on the Respondent's Request for a Continued Stay of Execution (Rule 54 of the ICSID Arbitration Rules); Waste v. Mexico (2004) Final Award; Tza Yap Shum v. Peru (2009) Decision on Jurisdiction; Metalclad v. Mexico (2000) Final Award; Empresa Eléctrica del Ecuador v. Ecuador (2009) Final Award; Enron v. Argentina (2008) Decision sobre la solicitud de la Republica Argentina de mantener la suspension de la ejecucion del Laudo (Regla 54 de las Reglas de Arbitraje del CIADI); Santa Elena v. Costa Rica (2000) Final Award; Thunderbird v. Mexico (2006) Final Award; Thunderbird v. Mexico (2006) Separate Opinion; Corn v. Mexico (2008) Decision sobre Responsabilidad; Aucoven v. Venezuela (2003) Final Award; TSA v. Argentina (2008) Final Award; Bayview v. USA (2006) Contrademanda sobre Jurisdiccion; Perenco v. Ecuador (2009) Decision sobre Medidas Provisionales; Siemens v. Argentina (2004) Decision on Jurisdiction; Brandes v. Venezuela (2009) Decision sobre las excepciones opuestas por la demandada en virtud de la Regla 41 (5) de las Reglas de Arbitraje del CIADI; Azurix v. Argentina (2003) Decision sobre Jurisdiccion; Azurix v. Argentina (2006) Final Award; Glamis V. USA (2009) Final Award; MTD v. Chile (2004) Final Award; Occidental et al v. Ecuador (2008) Decision on Jurisdiction; Occidental v. Ecuador (2004) Final Award; Aconquija et al v. Argentina (2000) Final Award; Desert Line v. Yemen (2008) Final Award; Bayview et al. v. USA (2007) Final Award; Helnan v. Egypt (2008) Final Award; Phoenix v. Czech Republic (2009) Final Award; Aguaytia v. Peru (2008) Final Award; Piero Foresti et al. v. South Africa (2010); Pantechniki v. Albania (2009) Final Award; Murphy v. Ecuador (2010) Laudo sobre Jurisdiccion; Global Trading et al v. Ukraine (2010) Final Award; Rachel S. Grynberg et al. v. Grenada (2010) Final Award; CDC v. Seychelles (2003) Final Award; Lucchetti et al. v. Peru (2005) – Final Award; Joy Mining v. Egypt (2004) Award on Jurisdiction; Malaysian Historical Salvors v. Malaysia (2007) Award on Jurisdiction; Telenor v. Hungary (2006) Final Award; and, Mihaly v. Sri Lanka (2002) Final Award.

The author is aware that this academic task requires a much more in-depth research; however this has been precluded due to the size of the present study. Thus, the reader may consider some of the ideas expressed within this chapter and, perhaps, in this entire research, to be over-generalized. The objective of this chapter is not only to provide the readers with an introduction to an emerging public-law concern: applying principles of administrative law to international regulatory disputes; but also to sow the seeds which may encourage further complementary studies.

### **c. Principle of legality**

This sub-section refers to the principle of legality. This principle is considered to be the main pillar of any legal system because it governs, to a greater or lesser extent, the '*state of law*' of a given society. Thus, it implies the assumption of legality of any regulatory conduct of the state. Furthermore, it can be said that other related principles derive from its application as will be demonstrated later in this chapter.

Nonetheless, the scope of this principle can be summarized largely as the due observance of the law by any individual (including natural and legal persons). In terms of this research, it can be said that this principle requires the submission of the state (i.e., public administration) to the law in order to thereby guarantee a private individual's legal status and in consequence their legal certainty.<sup>24</sup>

Additionally, it has been stated that such submission involves the duty of all public authorities, that together make up the powers of the state, to act with the due observance of the legal principles enshrined within a constitution, legislation and the

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<sup>24</sup> See A. R. Brewer Carias, Principios del Procedimiento Administrativo en America Latina (Universidad del Rosario, Editorial Legis, Colombia 2003), on page 3.

law in general.<sup>25</sup> The exercise of such powers, including the executive (administrative) power, must conform to the legal limits that have been granted to the government officers as well as to the aims for which they were granted.<sup>26</sup>

It can be stated that there are some arbitral awards that, despite their main aim of assessing the host state's regulatory conduct in accordance with the international investment standards established within an IIT, also make frequent references to some domestic law sources and principles in support of their decisions.

In the following sample of cases, it can be seen how different international arbitral tribunals refer to domestic law principles as a legal source to analyze and evaluate the regulatory conduct of the host state in accordance with the principle of legality.

viii. *Mobil Corporation et al v. Bolivarian Republic of Venezuela*  
(ICSID Case ARB/07/27) June 10, 2010 – *Decision on Jurisdiction*

This dispute arose out of two petroleum agreements for the exploration and production of oil and the alleged violation of the Netherlands-Venezuela BIT provisions for the implementation of a new petroleum policy and law in Venezuela.<sup>27</sup> Throughout the analysis of the parties' positions to determine the jurisdiction of the tribunal regarding the breach of Venezuelan investment law, the arbitral tribunal made references to some domestic law sources to help it to determine and clarify Venezuela's consent to arbitrate. For example, the tribunal cited the Constitution of Venezuela,<sup>28</sup> the Venezuelan Investment Law<sup>29</sup> and the Venezuelan Law on Commercial Arbitration.<sup>30</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> A request for arbitration was made on 6 September 2007 against Venezuela for their adoption of a new oil law and policy which was said to have amounted to a breach of the 1999 Venezuelan Law on the promotion and protection of investments, as well as a breach of the 1993 bilateral investment treaty between the Netherlands and Venezuela.

<sup>28</sup> See paragraphs 126 and 127.

<sup>29</sup> See paragraphs 93, 101, 102, 103, 105, 119 and 140.



Through this arbitral exercise, the tribunal decided to resort to the principle of legality in order to determine whether the conduct of the Venezuelan government (i.e., its unilateral offer to arbitrate) was or was not performed in accordance with and in submission to the principles of domestic law, alongside the principles of international law. Before this legal task was carried out, the tribunal referred to the premise which states that ‘... when tribunals interpret unilateral acts, they must have due regard to the intention of the state having formulated such acts. *In this respect domestic law may play a useful role.*’<sup>31</sup> (Emphasis added).

Based on this premise, the tribunal interpreted the text of article 22 of the Venezuelan investment act in an exhaustive manner<sup>32</sup> and found, *apart from Venezuela’s rights to adopt regulatory measures*,<sup>33</sup> that ‘...Article 22 does not provide a basis for jurisdiction of the Tribunal... [and it] does not constitute consent to jurisdiction with respect to any of the Claimants’.<sup>34</sup>

ix. *Waste Management, Inc v. Estados Unidos Mexicanos (ICSID Case No. ARB(AF)/00/3) April 30, 2004 – Final Award*

This case arose out of a concession for the provision of waste disposal services in the city of Acapulco, State of Guerrero, Mexico and the consequent violation of NAFTA provisions.<sup>35</sup> In its analysis of the case, the arbitral tribunal decided to consider and assess the regulatory conduct of some public entities of the Mexican Government as

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<sup>30</sup> See paragraph 128.

<sup>31</sup> See paragraph 96.

<sup>32</sup> Nonetheless, a different approach was taken by another arbitral tribunal in *Tza Yap Shum v. Republica del Peru* (ICSID Case No. ARB/07/6) June 19, 2009 – Decision on Jurisdiction. In this case, the tribunal simply opted to assume its jurisdiction based on wide interpretations of the facts and concluded that Peru had consented to include a certain type of national within the scope of the China-Peru BIT.

<sup>33</sup> For example: the right to adopt measures to protect national security; the conservation of natural resources and the integrity and stability of the Venezuelan financial system. See paragraph 122.

<sup>34</sup> See paragraphs 140 and 141.

<sup>35</sup> See paragraph 40.

well as their administrative actions separately.<sup>36</sup> This evaluation was carried out in order to determine Mexico's responsibility for the alleged violation of the NAFTA provisions (i.e., Chapter Eleven).<sup>37</sup>

When the arbitral tribunal assessed the conduct of the various Mexican entities in order to determine whether or not there was a violation of the 'minimum standard of treatment' (in this case, fair and equitable treatment and full protection and security provided for in Article 1105(1) of the NAFTA), it asserted that when referring to the legal nature of BANOBRAS, '[t]he mere fact that a separate entity is majority-owned or substantially controlled by the state does not *make it ipso facto an organ of the state*.'<sup>38</sup> (Emphasis added). In this particular situation, the tribunal missed the opportunity to resort in depth to domestic Mexican law (i.e., the act that creates BANOBRAS, e.g., Ley Orgánica del Banco Nacional de Obras y Servicios Públicos) in order to clarify this legal doubt since it is well known that the structure and legal nature of any entity belonging to the public administration is determined by administrative law principles such as the principles of hierarchy, decentralization, coordination, etc.

Curiously, despite this legal doubt, the arbitral tribunal decided to reject later 'the claim that Mexico was in breach of Article 1105(1) by reason of the conduct of Banobras'.<sup>39</sup> It is important to emphasize that the tribunal found no violation of Article 1105(1) of the NAFTA by the Mexican entities involved.

A similar situation can be found when Mexico 'objected to the jurisdiction of the tribunal on the ground, inter alia, that the Concession Agreement was an administrative

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<sup>36</sup> See paragraph 100.

<sup>37</sup> A request for arbitration was submitted against Mexico on 27 September 2000, 'for the actions of various state organs concerning the Claimant's investment in an enterprise to provide waste management services to the City of Acapulco in the State of Guerrero.' See paragraph 1, on page 3.

<sup>38</sup> See paragraph 75.

<sup>39</sup> See paragraph 104.

act governed by public law...'<sup>40</sup> and when the tribunal considered the unilateral acts (i.e., legislative acts) of the state as amounting to an expropriation.<sup>41</sup>

Moreover, when the tribunal evaluated whether Acaverde was expropriated by the Municipality of Acapulco, it quoted Article 1110 of the NAFTA which basically states that an expropriation may not be performed except '*(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law* [<sup>42</sup>] *and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.*'<sup>43</sup> (Emphasis added). In this respect, the tribunal stated that the declaration of the Mayor, after the concession was in force, was the nearest outright repudiation of the Acaverde.<sup>44</sup>

Furthermore, the arbitral tribunal also took the opportunity to point out that '...a unilateral and unjustified change in the exclusivity obligation could have amounted to an expropriation...'.<sup>45</sup> Within this statement, the arbitral tribunal mentions two different adjectives (e.g., 'unilateral' and 'unjustified') to determine whether a change can amount to an expropriation. Obviously, these two adjectives may have different meanings in international law and in national law, respectively. The question here will be whether these adjectives have to be evaluated separately in accordance with international law or national law, or jointly. Nonetheless, the arbitral tribunal did not take into consideration any legal source of Mexican law to determine whether the Mexican regulatory conduct was performed in accordance with its domestic law.

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<sup>40</sup> See, e.g., paragraph 120.

<sup>41</sup> See, e.g., paragraph 161.

<sup>42</sup> In the Spanish version, it states 'con apego al principio de legalidad' (in accordance with the principle of legality).

<sup>43</sup> See paragraph 104.

<sup>44</sup> See paragraph 161.

<sup>45</sup> See paragraph 161.

x. *Metalclad Corporation v. Estados Unidos Mexicanos (ICSID Case No. ARB (AF)/97/1) August 30, 2000 – Final Award*

The dispute concerned the alleged interference by Mexican local authorities with the activities of Metalclad to develop and operate a hazardous waste landfill.<sup>46</sup> The arbitral tribunal, in relation to this issue, most notably highlighted two points: (i) the requirement of having all required permits for the operation of the landfill (including the municipal construction permit); and (ii) the responsibility of the public authorities involved for the adoption of their administrative conducts.

Regarding these two points, the arbitral tribunal, in order to evaluate the administrative legal limits of the municipality of Guadalcázar, took into consideration some principles of Mexican law such as article 115 of the Mexican Constitution<sup>47</sup> and Mexico's General Ecology Law of 1998.<sup>48</sup>

Similarly, the arbitral tribunal stated, in relation to the alleged violation of the Article 1105 of the NAFTA (i.e., the Fair and Equitable Treatment), that (i) 'the denial of the permit by the municipality by reference to environmental impact considerations... *was improper, ...*'<sup>49</sup> (emphasis added); (ii) '[t]he absence of a clear rule... amounts to a failure on the part of Mexico *to ensure the transparency required by the NAFTA.*'<sup>50</sup> (Emphasis added); (iii) '*... the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility*'<sup>51</sup> (emphasis added); and, (iv) '*Mexico failed to ensure a transparent and*

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<sup>46</sup> A request for arbitration was submitted against Mexico on 2 January 1997 for the breach of the provisions of Article 1105 of the NAFTA. Metalclad had in particular alleged violations of fair and equitable treatment; full protection and security; and expropriation with compensation.

<sup>47</sup> See paragraph 81.

<sup>48</sup> See paragraph 82.

<sup>49</sup> See paragraph 86.

<sup>50</sup> See paragraph 88.

<sup>51</sup> See paragraph 93.

*predictable framework* for Metalclad's business planning and investment.<sup>52</sup>(Emphasis added).

Furthermore, in relation to the alleged violation of Article 1110 of the NAFTA and regarding whether the Mexican authorities' actions were equivalent to an indirect expropriation,<sup>53</sup> the arbitral tribunal established that 'the Municipality acted outside its authority'<sup>54</sup> and that '[the Ecological Decree] had the effect of barring forever the operation of the landfill.'<sup>55</sup>

Ultimately, the arbitral tribunal, based mainly on the above-mentioned premises, concluded that these administrative actions of the Mexican authorities were the equivalent of an indirect expropriation in violation of article 1110 of the NAFTA.<sup>56</sup>

With respect to the outcome of this award, it may be important to draw attention to the fact that even though the arbitral tribunal took into consideration some legal sources of Mexican law, in order to determine the responsibility of Mexico, surprisingly it did not directly consider some Mexican legal principles, such as the principle of legality or the principle of proportionality, which could have helped the tribunal to determine whether the administrative conduct of the Municipality of Guadalcázar was within the main legal provisions of the Mexican law. In this case, if the investors direct legal rights were affected by any legal act of the state, the investor could have sought the reestablishment of the legal situation infringed or perhaps compensation before the competent national court.

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<sup>52</sup> See paragraph 99.

<sup>53</sup> See paragraph 106.

<sup>54</sup> See paragraph 104.

<sup>55</sup> See paragraph 106.

<sup>56</sup> See paragraphs 107 and 112.

xi. *International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules) January 26, 2006 – Final Award*

This dispute was related to the alleged breach of the Claimant's legitimate expectations of obtaining the respective government permits to carry out a business of operating gaming facilities.<sup>57</sup> The arbitral tribunal in this case referred to the Claimant's intention of requesting an official opinion regarding the legality of its proposed gaming operations (i.e., skill machines)<sup>58</sup> as well as the SEGOB's answer to it, where it was stated that '...the provisions established under the Federal Law of Games and Sweepstakes [there] are enforceable legal dispositions that specifically prohibit gambling and luck related games [i.e., coin-swallowers, token-swallowers or slot machines] within the Mexican territory...'<sup>59</sup>

When the tribunal analyzed the merits of the case, particularly the aspect related to the role of Chapter Eleven of the NAFTA in the case, it found that '*...under Mexican law, specifically the Ley Federal de Juegos y Sorteos of 31 December 1947, gambling is an illegal activity.*'<sup>60</sup> (Emphasis added). Similarly, the tribunal found, following the same context, that '[i]t cannot be disputed that Thunderbird knew when it chose to invest in gaming activities in Mexico that gambling was an illegal activity under Mexican law'.<sup>61</sup>

Nonetheless, the tribunal decided to go ahead in its assessment by stating that it was its role to '*...examine whether the conduct of Mexico and the measures employed by SEGOB in relation to the EDM entities were consistent with Mexico's obligations*

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<sup>57</sup> A request for arbitration was submitted on 1 August 2001 against Mexico for the breach of its obligations under Chapter Eleven of the NAFTA, breach of national treatment; most-favoured-nation treatment; minimum standard of treatment; and expropriation and compensation was alleged. See paragraph 6, on page 4.

<sup>58</sup> See paragraph 48.

<sup>59</sup> See paragraph 55.

<sup>60</sup> See paragraph 124.

<sup>61</sup> See paragraph 164.

under Chapter Eleven of the NAFTA.<sup>62</sup> (Emphasis added). Within this context, the tribunal recognized the right belonging to Mexico to change its regulatory policy as well as its discretion to adopt such a policy through regulation and administrative conduct.<sup>63</sup> Despite this recognition the tribunal established that ‘[t]he international law disciplines of Articles 1102, 1105 and 1110 in particular, only assess whether Mexican regulatory and administrative conduct breached these specific disciplines. *The perspective is of an international law obligation examining national conduct as a “fact”*.<sup>64</sup> (Emphasis added).

Thus, it is important to stress that when the tribunal evaluated the violation of the minimum standard of treatment, it referred to the conduct of Mexico by stating that such a performance did not breach this international principle.<sup>65</sup> The question that public law lawyers will ask here will be whether one can consider the regulatory conduct of the state as a ‘fact’ whilst disregarding the main principles of law that gave origin to that regulatory conduct (i.e., the administrative law principles). Moreover, from this case, it can be suggested that the disregard of the domestic principle of legality could undermine the sovereignty of a state, owing to the fact that an activity which is expressly prohibited by a country’s legal framework could be legitimized by an arbitral decision. This is an illustration of extreme cases in which ISTA could conceivably lead to the legitimatization of illicit activities such as the trafficking of drugs, prostitution and corruption at international level for considering them as a part of an investment.

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<sup>62</sup> See paragraph 127.

<sup>63</sup> See paragraph 126.

<sup>64</sup> See paragraph 127.

<sup>65</sup> See paragraph 195.

To conclude, the tribunal later found that the SEGOB's answer did not create a legitimate expectation under Articles 1102, 1105 and/or 1110 of the NAFTA.<sup>66</sup> Additionally, the tribunal also evaluated whether the conduct of a Mexican entity created a legitimate expectation or not, in favour of the Claimant. This latter point will be expanded upon further in the sub-section related to the principle of legal certainty and legitimate expectations. However, it has been referred to, due to the fact that a separate opinion was issued in this case, the following sub-section will analyze the separate opinion as far as the principle of legality is concerned, leaving the issue of legitimate expectations to be developed later in this chapter.

xii. *International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion*

In this separate opinion, the dissenting arbitrator concurred with the other two arbitrators in relation to '*several significant issues of the case*',<sup>67</sup> however he disagreed with the approach adopted towards the principle of legitimate expectations in the particular context of an investment promotion and protection treaty.<sup>68</sup> He drew attention to the necessity of discussing how 'both normative and contours of the legitimate expectation concept are shaped as should be construed under Art. 1105 of the NAFTA and their significance in the particular factual context.'<sup>69</sup>

Within the context of the discussion, the dissenting arbitrator emphasized the following points: (i) the exposition of foreign investors to the sovereign and regulatory power of the host state and the regulation of this relationship through the investment arbitration

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<sup>66</sup> See paragraph 165.

<sup>67</sup> Agreement was reached on the following: jurisdiction; admissibility; control and waivers; the rejection of the expropriation claim; the rejection of the 'denial of administrative justice' claim; the rejection of the NAFTA government positions regarding the direct intention of harming the foreign investor; and the general view that principle of legitimate expectations formed part of the duty give fair and equitable treatment. See, e.g., paragraph 1.

<sup>68</sup> See paragraph 4.

<sup>69</sup> See paragraph 3.



system;<sup>70</sup> (ii) the conflict between international and domestic interpretations and applications with regard to the notion of legitimate expectations;<sup>71</sup> (iii) the priority of the international interpretation and application over the domestic one (i.e., over ‘any dominant interpretation of applicable Mexican law on the legality of the operation...’);<sup>72</sup> (iv) the duty of the host state to act in a diligent and an unambiguous manner when emitting official communications;<sup>73</sup> and, (v) the responsibility of the host state to ensure that foreign investors have clearly understood the content of certain official communications.<sup>74</sup>

The dissenting arbitrator also highlighted the importance of determining, with sufficient clarity, the gravity and materiality of the effect upon legitimate expectations since the minor conduct of any public official may give jurisdiction to a treaty tribunal.<sup>75</sup> For this reason, he emphasized the existence and recognition of this principle, within and by many developed administrative law systems and proposed in consequence that a comparative study on the ‘common principles of the principal administrative law systems’ be undertaken which could be used as a good reference to interpret treaty provisions.<sup>76</sup>

Nevertheless, the arbitrator concluded that since the ‘*solicitud*’ (written request) did not come ‘*out of the blue*’, the combination of this document with the subsequent conduct of the SEGOB (including the ‘*oficio*’) should have been considered as a ‘green light’<sup>77</sup>

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<sup>70</sup> See paragraph 12.

<sup>71</sup> See paragraph 26.

<sup>72</sup> See paragraph 26.

<sup>73</sup> See paragraph 4.

<sup>74</sup> See paragraph 6.

<sup>75</sup> See paragraph 14.

<sup>76</sup> See paragraph 28.

<sup>77</sup> See paragraph 85.

(i.e., equivalent to an administrative permit) and therefore considering this act constituted a violation of ‘legitimate expectations under the NAFTA Art. 1105’.<sup>78</sup>

Finally, he stated that under both international and comparative administrative law, there is an assumption of the legitimacy of official acts and such an assumption should be a burden on the host state as a kind of risk.<sup>79</sup> Nonetheless, throughout this case, the arbitrator ignored the fact that the public law principle of legality is connected to the principle of competence. This well-known principle of public law states that officials are entitled only to perform those activities that are authorised by law. This compares with the situation in private law where the principle of capacity allows individuals to do everything that is not forbidden by law. This principle adjusts the breadth of discretionary power of public officials. For this reason, the fact that an official expressly pointed out that a given gaming activity was prohibited does not imply that he was recognizing or authorizing a determined right. This observation serves to illustrate the impact that the consideration of these domestic law principles may have on the outcome of a case.

xiii. *Corn Products International, INc. v. Los Estados Unidos Mexicanos (ICSID Case No. ARB(AF)/04/01) January 15, 2008 – Decision on Responsibility*

This dispute concerned the imposition of a tax at 20% on any drink which used a sweetener not made from cane sugar.<sup>80,81</sup> The following points are made clear throughout the case: (i) the introduction of the tax was an initiative of and approved by the Federal Congress of Mexico;<sup>82</sup> (ii) the Mexican Executive Power tried to suspend

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<sup>78</sup> See paragraph 23.

<sup>79</sup> See paragraph 91.

<sup>80</sup> See paragraph 3.

<sup>81</sup> A request for arbitration was submitted on 21 October 2003 against Mexico for the breach of its obligations under Chapter Eleven of the NAFTA. The breach of national treatment; performance requirements; and expropriation and compensation were alleged. See paragraph 5.

<sup>82</sup> See paragraph 41 and 43.

the application of the tax but it was forced to apply the tax by the Supreme Court, due to the lack of Executive authority, to suspend the application;<sup>83</sup> (iii) the adoption of the tax was a countermeasure taken by Mexico in response to prior violations of the NAFTA by the United States;<sup>84</sup> and (iv) the allegation that the tax was adopted to protect the Mexican sugar industry.<sup>85</sup>

When the arbitral tribunal rejected the alleged violation of Article 1110 of the NAFTA (Expropriation and Compensation), it stated that even though some government measures can be considered discriminatory it does not necessarily mean that they equal expropriation unless they affect and destroy the business in question.<sup>86</sup>

In this case, it seems like the investor did not seek the protection of his/her rights by exercising any domestic legal remedy, such as the nullity of this tax law. Moreover, if the adoption of this act would have been illegal, this illegality should have been recognized by the respective national court. However, in this case, the arbitral tribunal with its analysis is substituting the duty of the investor to challenge the legality of a given domestic act before the competent national tribunal or court.

xiv. *Perenco Ecuador LTD v. Republica del Ecuador and Empresa Estatal Petroleos del Ecuador (ICSID Case No. ARB/08/6) May 8, 2009 – Decision sobre Medidas Provisionales*

The dispute in this case was a consequence of two petroleum contracts, the imposition of a new Ecuadorian Petroleum tax and the subsequent violation of the France-Ecuador BIT provisions.<sup>87,88</sup> Throughout the case, the arbitral tribunal drew attention to the following aspects: (i) the Ecuadorian Congress amended the Hydrocarbon Law (Law

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<sup>83</sup> See paragraph 43.

<sup>84</sup> See paragraph 59.

<sup>85</sup> See paragraph 55.

<sup>86</sup> See paragraph 93.

<sup>87</sup> See paragraph 2.

<sup>88</sup> A request for arbitration was submitted on 30 April 2008 against Ecuador for the breach of these contracts and the provisions of the France-Ecuador BIT. See paragraph 11.

42) to introduce a new tax of at least 50% on the extraordinary income generated by the ‘difference in price’;<sup>89</sup> (ii) the Ecuadorian Supreme Court declared that such amendment was constitutional;<sup>90</sup> (iii) the Ecuadorian Executive discretionally increased this tax to 99%;<sup>91</sup> (iv) Perenco decided to withhold the payment required under both the legislative and administrative acts;<sup>92</sup> (v) Perenco proposed to transfer ‘the disputed Law 42 payments into an escrow account maintained by an independent escrow agent in a neutral location pending resolution of the dispute’;<sup>93</sup> (vi) this proposal was refused by Ecuador;<sup>94</sup> (vii) Ecuador considered early termination of the petroleum contracts;<sup>95</sup> (viii) the Ecuadorian Government released three official communications requesting Perenco to pay US\$ 327 million;<sup>96</sup> and, (xix) an Ecuadorian Court ordered Perenco’s assets to be seized, i.e., crude oil in Ecuador, until the above-mentioned amount was fully paid.<sup>97</sup>

It is within this background that Perenco requested provisional measures in order to preserve its rights,<sup>98</sup> whilst Ecuador argued that it had the sovereign power and duty to apply ‘validly enacted laws’.<sup>99</sup> However, the tribunal stated that even though a domestic law could be promulgated by a sovereign state, in accordance with its constitution, it does not mean that such sovereign power could hamper the power of an ICSID tribunal to grant provisional measures. In fact, it was suggested during the

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<sup>89</sup> See paragraph 6.

<sup>90</sup> See paragraph 8.

<sup>91</sup> See paragraph 10.

<sup>92</sup> See paragraph 11.

<sup>93</sup> See paragraph 11.

<sup>94</sup> See paragraph 11.

<sup>95</sup> See paragraph 12.

<sup>96</sup> See paragraph 11.

<sup>97</sup> See paragraphs 14 and 15.

<sup>98</sup> See paragraph 20.

<sup>99</sup> See paragraph 25.

course of submissions that the granting of such measures would have the effect of restricting ‘the freedom of the State to act as it would wish.’<sup>100</sup>

Lastly, the tribunal stated that Perenco faced imminent ‘confiscation’<sup>101</sup> of its assets<sup>102</sup> and subsequently recommended provisional measures in order to freeze Ecuador’s regulatory power and prevent it from demanding, instituting or further pursuing any legal or judicial action against Perenco. This included the adoption of any administrative action that may affect or alter, directly or indirectly, the legal status of Perenco as was ‘agreed upon by the parties’.<sup>103</sup>

In this case, the arbitral tribunal dismissed the constitutional powers of Ecuador to adopt new laws to protect its sovereignty and its public interest. Perhaps more distressing is the fact that the investor used an arbitral mechanism to limit the constitutional powers of the state thus affecting the elemental notion of the principle of legality. This type of arbitral decision is an example of how a legal pretention which could not be satisfied by a domestic legal remedy could be challenged through an arbitral mechanism at the international level.

xv. *Azurix Corp. v. la Republica Argentina (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award.*

The issue in this case related to the public services partnership that existed between Azurix Corp. and the Province of Buenos Aires to process and treat drinking water.<sup>104</sup>

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<sup>100</sup> See paragraph 50.

<sup>101</sup> Here, it is noteworthy to highlight that in the English version of this award, the tribunal used the word ‘seizure’ whereas in the Spanish version it used the word ‘confiscation’. According to the Barron Law Dictionary (1996), these are two different concepts, e.g., ‘seizure’ is defined as ‘the act of forcibly dispossessing an owner of property, under actual or apparent authority of law; also, the taking of property into the custody of the court in satisfaction of a judgment...’ and ‘confiscate’ is defined as taking ‘property without just compensation...’.

<sup>102</sup> See paragraph 46.

<sup>103</sup> See paragraph 79.

<sup>104</sup> A request for arbitration was submitted on 19 September 2001 against Argentina for the breach of the Argentina-USA BIT obligations, specifically Expropriation without Compensation; Fair and Equitable

Throughout the tribunal's assessment of the case, the following points became relevant:

(i) the alleged violation of the Argentina-USA BIT provisions by Argentina itself through its actions and omissions emanating from its political-territorial entities;<sup>105</sup> (ii) the recognition in international law of the state's responsibility for the acts of its organs/entities and its political-territorial entities;<sup>106</sup> (iii) the 'inexistent' contractual relationship between Argentina and Azurix, but between the Province and Azurix Buenos Aires, S.A. (ABA), where Azurix assumed certain legal commitments;<sup>107</sup> and (iv) the legal nature of the concession agreement and its subjection to a tariff regime that was also subject to the adoption of administrative actions by the Province as a public authority.<sup>108</sup>

The tribunal examined the applicable law and it decided to judge the case mostly in accordance with the ICSID Convention, the BIT and the applicable international law, even though it was also stated that the Argentina law should not be disregarded.<sup>109</sup>

Consequently, the tribunal evaluated the Province's actions in order to determine whether they were adopted 'in the exercise of its public authority or as a party to a contract.'<sup>110</sup> Following this strategy, the tribunal scrutinized a series of administrative acts such as the Province's administrative behaviour at the time of the takeover of the concession; the measures related to tariff regime; the Works in Circular 31(A); the Program for Optimizing and Expanding Service (POES); Circular 52(A) and Canon Recovery; and, the conduct of the Province after service transfer. In this context it is

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Treatment; Full Protection and Security; Taking Arbitrary Measures; Failing to Observe Argentina's BIT obligations; and Failing to provide legal transparency. See paragraph 9.

<sup>105</sup> See paragraph 3.

<sup>106</sup> See paragraph 50.

<sup>107</sup> See paragraph 52.

<sup>108</sup> See paragraph 53.

<sup>109</sup> See paragraph 67.

<sup>110</sup> See paragraph 68.

significant to emphasize that the review of these kinds of administrative acts is normally left to the competence of domestic courts.

In addition, when the tribunal assessed the violations of the BIT's provisions, it stated:

(i) with regard to the expropriation without compensation, that '... the impact on the investment attributable to the Province's actions was not to the extent required to find that, in the aggregate, these actions amounted to an expropriation...';<sup>111</sup> (ii) in relation to fair and equitable treatment, that '[c]onsidered together, [the Province's] actions reflect a pervasive conduct of the Province, in breach of the standard of fair and equitable treatment.';<sup>112</sup> (iii) with regard to arbitrary measures, that '... [The measures taken by the Province] are arbitrary actions without a basis in Law or the Concession Agreement...';<sup>113</sup> and, (iv) in relation to the full protection and security, that '... the [existing] interrelationship [between the] fair and equitable treatment and the obligation to afford the investor full protection and security' can give grounds, in conjunction with the incorporation of the word 'full', for Argentina's responsibility for having breached this principle of full protection and security.<sup>114</sup>

Thus, this case demonstrates that the arbitral tribunal examined the regulatory conduct of the state without making any reference to the domestic principle of legality which is considered the legal basis of any actions deriving from the state. Conversely, the arbitral tribunal could have justified its decision in terms of the principle of legality. Hence, legal justification is one of fundamental pillars of any administrative or judicial decision in the fulfilment and development of the principle of legality.

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<sup>111</sup> See paragraph 322.

<sup>112</sup> See paragraph 377.

<sup>113</sup> See paragraph 393.

<sup>114</sup> See paragraph 408.

xvi. *MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile (ICSID Case No. ARB/01/7) May 25, 2004 – Final Award*

This disagreement arose out of a foreign investment contract to build a large planned community near to Santiago and the following violation of the Malaysia-Chile BIT provisions.<sup>115,116</sup> During this case the tribunal emphasized the following aspects: (i) the Claimant's expectation that the Municipality of Pirque would initiate the change in zoning of Pirque area and the subsequent endorsement of it by the Ministry of Housing and Urban Development (MINVU);<sup>117</sup> (ii) the project's endorsement by the Mayor of Pirque;<sup>118</sup> and (iii) the rejection of MINVU to change the zoning of the area due to conflict of the project '*with the existing urban development plan.*'<sup>119</sup>

Based on these matters, the tribunal decided to apply international law principles to the merits of the case despite the request made by Chile to apply Chilean law.<sup>120</sup> Curiously, it stated that '[Chile] has the right to decide its urban policies and legislation',<sup>121</sup> unless the exercise of this sovereign power contravenes the international obligations assumed through an IIT.<sup>122</sup> However, this statement is evidence of a legal contradiction as the tribunal recognized Chile's right to apply its urban policy and legislation but the tribunal decided to disregard these urban policies and legislation when considering international obligations. Obviously, this contradiction undermines the notion of the domestic principle of legality.

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<sup>115</sup> See paragraph 54.

<sup>116</sup> A request for Arbitration was submitted on 26 June 2001 against Chile for the breach of the Malaysia-Chile BIT provisions, specifically 'Most Favoured Nation Treatment'; 'Fair and Equitable Treatment'; 'Expropriation without Compensation'; and the breach of the Foreign Investment Contracts. See paragraph 83.

<sup>117</sup> See paragraph 56.

<sup>118</sup> See paragraph 61.

<sup>119</sup> '[T]he policy of the Government was to encourage development of Santiago towards the North and not the South where Pirque [was] located.' See paragraph 80.

<sup>120</sup> See paragraph 86.

<sup>121</sup> See paragraph 98.

<sup>122</sup> See paragraph 99.



Moreover, when the tribunal analyzed fair and equitable treatment, it took the Chilean Foreign Investment Commission's approval as an admission of the MTD to invest in the country and therefore it was used to determine that such conduct was 'a breach of the obligation to treat an investor fairly and equitably.'<sup>123</sup> In relation to the second hypothesis, the arbitral tribunal determined the state's responsibility without taking into consideration any domestic legal principles that normally give grounds for the states regulatory conduct. An example of this reference is the existing causal link between the damage caused to a given individual and the public authority performed by the state.

xvii. *Occidental Petroleum Corporation et al v. The Republic of Ecuador (ICSID Case No. ARB/06/11) September 9, 2008 – Decision on Jurisdiction*

The dispute concerned a participation contract to explore and exploit hydrocarbons in the Ecuadorian Amazon and the consequent violation of the USA-Ecuador BIT provisions.<sup>124,125</sup> The arbitral tribunal considered the following aspects to be of importance: (i) the existence of the operating agreements between OEPC and AEC in 2000;<sup>126</sup> (iii) the granting of a 40% economic interest from OEPC to AEC;<sup>127</sup> (iii) the refusal on the part of the Ecuadorian government to approve the transfer of legal title in the year 2004;<sup>128</sup> and (iv) the Ecuadorian government decision of 2006, to terminate the participation contract and the respective operating agreements through the declaration of 'caducidad' (caducity/annulment), based on: the lack of ministerial authorizations; the violation of the participation contract; as well as the violation of the Ecuadorian Hydrocarbon Law and regulations.<sup>129</sup>

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<sup>123</sup> See paragraph 166.

<sup>124</sup> See paragraph 10.

<sup>125</sup> A request for arbitration was submitted against Ecuador Mexico on 17 May 2006 for the alleged breaches of domestic law and international law, as well as breaches of the USA-Ecuador BIT. See paragraph 10.

<sup>126</sup> See paragraph 12.

<sup>127</sup> See paragraph 13.

<sup>128</sup> See paragraph 16.

<sup>129</sup> See paragraphs 17 and 18.

The Claimant in this case originally sought the declaration of Ecuador's responsibility for having breached its obligations under the contracts, the treaty, Ecuadorian law and international law; and also sought the declaration of the Ecuador's *Caducidad* Decree as null and void and the reposition of its rights.<sup>130</sup> However, the Claimant modified the petition and only pursued Ecuador's breach of contract.

Ecuador objected to the tribunal's jurisdiction, it argued the presumption of legality of its administrative act (i.e., the *Caducidad* Decree). Ecuador also argued exclusivity of the Ecuadorian administrative court's competence to deal with this kind of legal matter.<sup>131</sup> This latter argument was based on an express provision in the Ecuadorian Constitution and of the Ecuadorian law on arbitration and mediation that excluded the revision of unilateral administrative acts of the state by international arbitration.<sup>132</sup> Moreover, the same exception was also included into and ratified by clause 22 of the participation contract.<sup>133</sup>

Nonetheless, despite Ecuador's Constitutional and legal argument about the exclusion and the subsequent contractual 'unequivocal waiver of arbitrability', the arbitral tribunal decided that the 'caducidad-related dispute' was under its jurisdiction. This decision was mainly based on the idea that any exception would require 'clear language' to this effect<sup>134</sup> as well as the existence of the international principle which states that domestic law cannot be invoked in order to avoid an international treaty obligation.<sup>135</sup>

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<sup>130</sup> See paragraph 21.

<sup>131</sup> See paragraph 24.

<sup>132</sup> See paragraph 37.

<sup>133</sup> See paragraph 63.

<sup>134</sup> See paragraphs 70 and 71.

<sup>135</sup> See paragraph 86.

In this instance, the arbitral tribunal did not only disregard the provisions of the Ecuadorian constitution and its arbitration law regarding the review of the unilateral acts of the state, but it also dismissed the will of parties expressed in the participation contract. In other words, the arbitral tribunal ignored the scope of the principle of legality that governs any legal system to which the investor decided to be submitted. Due to this reason, the arbitral tribunal exceeded its functions by violating the principle of legality which happens to govern and limit the tribunal's competences, i.e., the arbitral tribunal incurred an extra limitation of its competence.

xviii. *Occidental Exploration and Production Company v. The Republic of Ecuador (London Court of International Arbitration Administered Case No. UN 3467) July 1, 2004 – Final Award*

The problem in this case was related to a participation contract to undertake the exploration for and exploitation of oil in Ecuador, the reimbursement of Value-Added Tax (VAT) and the subsequent violation of the USA-Ecuador BIT provisions.<sup>136,137</sup> Throughout the assessment of the case, the arbitral tribunal highlighted the following points: (i) OEPC's application for VAT reimbursements on a regular basis; (ii) SRI's issuance of resolutions denying further reimbursements as they were included in the formula contract; (iii) OEPC's seeking legal remedies through the Ecuadorian Tax Court; and, (iv) OEPC's request for legal remedies under the USA-Ecuador BIT.<sup>138</sup>

The tribunal, in attempting to resolve the problem between these two parties, rejected the objection to the 'Fork In The Road' clause. It pointed out that, in order to avoid the creation of 'a situation of incompatibility', the decisions adopted by Ecuadorian courts 'on matters of interpretation of the Ecuadorian Tax have been of great help to this

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<sup>136</sup> See paragraphs 1 and 2.

<sup>137</sup> A request for arbitration was submitted on 11 November 2011 against Ecuador for the breach of the USA-Ecuador BIT provisions, specifically expropriation without compensation. See paragraphs 4 and 79.

<sup>138</sup> See, e.g., the Introduction of the Award, paragraphs 1 to 6.

Tribunal in its own interpretation of both the Treaty and *the relevant provisions of Ecuadorian law...*<sup>139</sup> (Emphasis added). Furthermore, when dealing with the aspect related to the exclusion of matters of taxation, the tribunal stated that it was its duty to examine ‘a tax matter associated with an investment agreement’.<sup>140</sup> For this reason, it decided that the merits were going to be judged in accordance with various sources of law, including Ecuadorian tax legislation.

Thus, when the tribunal examined the ‘meaning and extent of Ecuador’s tax legislation’, it carried out a detailed analysis of Ecuadorian tax law and concluded that OEPC was entitled to the reimbursements.<sup>141</sup> Further to this, the arbitral tribunal also found Ecuador responsible for having breached the USA-Ecuador international obligations relating to national treatment, fair and equitable treatment, and full protection and security, and the minimum standard of treatment.

Ultimately, in its final decision the arbitral tribunal ordered, amongst other points, (i) that ‘[e]xcept for the amount of compensation and interest determined in this Award, all requests for refund submitted to the SRI, shall *in future follow the normal administrative procedures of the Ecuadorian law*’ (emphasis added); and that ‘[t]he Claimant [was] entitled to retain all amount of VAT reimbursed by the SRI and the *resolutions ordering the return of such amounts are without legal effect.*’<sup>142</sup> (Emphasis added).

The arbitral tribunal in this case was contradictory in its own arguments due to the fact that it recognized the application of domestic law, but it disregarded those decisions that were adopted in accordance with domestic law. The tribunal did this in order to

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<sup>139</sup> See paragraph 58.

<sup>140</sup> See paragraph 73.

<sup>141</sup> See paragraph 143.

<sup>142</sup> See paragraphs 3 and 6.

give grounds to the Claimant's international petition. Thus, there seems to be a contradiction between the action of an arbitral tribunal and the scope of the principle of legality because it appears that the tribunal respects domestic law but simultaneously ignores national law in favour of the Claimant's petition.

xix. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) November 21, 2000 – Final Award*

This case arose out of a concession agreement to provide sewage and water services to the Province of Tucuman, Argentina and the following violation of the Argentina-France BIT provisions.<sup>143,144</sup> In an attempt to resolve the dispute, the arbitral tribunal established the following facts: (i) the omission of Argentina to undertake actions to avoid the Tucuman Province from taking certain regulatory actions that could be in prejudice to the concession agreement; (ii) the mutually-agreed and 'exclusive' jurisdiction (Clause 16.4. of the concession contract) given to Tucuman administrative courts to interpret and apply the agreement; (iii) the legal meaning of this forum-selection clause in light of the BIT and ICSID Convention's provisions; (iv) the jurisdiction of the arbitral tribunal to evaluate the alleged violations of the Argentina-France BIT provisions; and (v) the tribunal's decision to decline its competence due to the parties' duty of solving their legal differences through the administrative courts of the Tucuman Province.<sup>145</sup>

In reaching a conclusion on Argentina's international responsibility, the tribunal took into consideration the relationship between Tucuman's administrative acts and the

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<sup>143</sup> See paragraph 26.

<sup>144</sup> A request for arbitration was submitted on 26 December 1996 against Argentina for the breach of the Argentina-France BIT provisions, specifically 'Fair and Equitable Treatment'; 'Full Protection and Security' and 'Expropriation and Compensation'. See, e.g., introduction and summary, on page 1.

<sup>145</sup> See, e.g., the Introduction and Summary, pages 1-3.

performance of the parties under the concession agreement.<sup>146</sup> The tribunal evaluated the province's acts that 'resulted in a fall in the recovery rate under the concession contract';<sup>147</sup> 'acts that unilaterally reduced the tariff rate';<sup>148</sup> 'abuses of regulatory authority';<sup>149</sup> and, 'dealings in bad faith'.<sup>150</sup>

Finally, the arbitral tribunal stated that it was difficult for it to determine Argentina's international responsibility.<sup>151</sup> This was due to (i) the difficulty in determining which actions were adopted by the province as a sovereign authority and as a contracting party<sup>152</sup> and (ii) the fact that the Claimant did not exhaust local remedies as agreed upon in the concession agreement.<sup>153</sup> For the tribunal, this latter point represented a key issue within the process since there was no evidence of a refusal of '*procedural*' or '*substantive*' justice by Argentina and therefore it did not constitute a violation of the respective BIT provisions.<sup>154</sup>

Consequently, it can be said in this case that the arbitral tribunal recognized the jurisdiction of the domestic courts (i.e., internal forum) to settle any legal dispute derived from the performance of the concession agreement. Furthermore, it can be suggested that this tribunal reaffirmed the public law concept by respecting the principle of legality that reigns in any legal system including the application of this principle to its functions. In other words, the principle of legality was applied to determine the tribunal jurisdiction. In addition, the fulfilment of this principle is a *sine que non* requisite for any claimant to resort to an international jurisdiction.

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<sup>146</sup> See paragraph 64.

<sup>147</sup> See paragraphs 65 and 66.

<sup>148</sup> See paragraph 67.

<sup>149</sup> See paragraphs 68 and 69.

<sup>150</sup> See paragraphs 70-76 64.

<sup>151</sup> See paragraph 79.

<sup>152</sup> See paragraph 79.

<sup>153</sup> See paragraph 80.

<sup>154</sup> See paragraphs 80 and 82.

xx. *Desert Line Projects LLC v. The Republic of Yemen (ICSID Case No. ARB/05/17) February 6, 2008 – Final Award*

This dispute originated from an oral agreement and several written contracts for the construction of asphalt roads in Yemen and the consequent violation of the Yemen-Oman BIT provisions.<sup>155,156</sup> The following facts were made clear to the tribunal during the course of submissions: (i) the disagreement of the contracting parties on the amounts due for the works executed;<sup>157</sup> (ii) the Claimant's request for arbitration against Yemen before the Yemeni commercial court requested, amongst other issues, the payment of the amounts due;<sup>158</sup> (iii) the rendering of the commercial court award that recognized, amongst other points, the Claimant's entitlement to receive certain amounts of money;<sup>159</sup> (iv) the disagreement of the Claimant with the calculation award carried by the commercial court<sup>160</sup> (v) the Respondent's request for and the Claimant's opposition to the annulment of the commercial award before Yemeni courts based on the award's invalidity and violation of due process;<sup>161</sup> (vi) the Respondent's proposal, of the parties' signature to and the Yemeni court's endorsement of a 'settlement agreement' as a final settlement of the dispute including an offer of payment;<sup>162</sup> and (vii) the Claimant's intention to challenge the validity of the '*settlement agreement*' and its subsequent decision of rescinding this agreement to consequently seek ICSID arbitration.<sup>163</sup>

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<sup>155</sup> See paragraphs 6-11.

<sup>156</sup> A request for arbitration was submitted on 2 August 2005 against Yemen for the breach of the Yemen-Oman BIT provisions. See paragraph 81.

<sup>157</sup> See paragraphs 17 and 18.

<sup>158</sup> See paragraph 21.

<sup>159</sup> See paragraph 31.

<sup>160</sup> See paragraph 32.

<sup>161</sup> See paragraphs 36 and 42.

<sup>162</sup> See paragraphs 39, 43 and 44.

<sup>163</sup> See paragraphs 47 and 48.

Within this context, the Claimant sought through ICSID arbitration, apart from its pecuniary request, the declaration of Yemen's international responsibility for breaching the Yemen-Oman BIT provisions as well as declaration of the 'settlement agreement' as 'null and void and/or rescinded'.<sup>164</sup> In dealing with the Respondent's argument about the legal nature of the Claimant's investment, the arbitral tribunal not only referred to the BIT provisions, but also to Yemeni investment law in order to consider the legality of the said investment in accordance with Yemen law.<sup>165</sup>

Furthermore, the tribunal stated that the 'settlement agreement' was signed under duress.<sup>166</sup> Subsequently, it also concluded that, owing to the fact that the agreement was in contradiction with the Respondent's BIT obligations, the agreement was internationally 'ineffective'.<sup>167</sup>

Conclusively, the tribunal seems to have acted as a *De Novo* review tribunal by reviewing the Yemeni Arbitral Award. This tribunal ordered the entire implementation of this award.<sup>168</sup> However, the tribunal did not mention the right of the parties to resort to the domestic forum to resolve the argument surrounding the validity or legality of the settlement agreement. Conversely, the tribunal ignored the content of the settlement agreement by declaring its international ineffectiveness and also by ignoring the principle of legality that rules the domestic forum. It is well-known in public law that any state entity can conclude a settlement agreement, however this is only possible if there is an express authorization to do so in law.

xxi. *Helnan International Hotels A/S v. The Arab Republic of Egypt*  
(ICSID Case No. 05/19) July 3, 2008 – Final Award

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<sup>164</sup> See paragraph 58.

<sup>165</sup> See paragraphs 103 and 106.

<sup>166</sup> See paragraph 190.

<sup>167</sup> See paragraph 194.

<sup>168</sup> See paragraph 205 and point 3 of the disposition.



The disagreement related to this case, arose from a management contract relating to the the Sheppard Hotel in Cairo, Egypt and the following violation of the Egypt-Denmark BIT provisions.<sup>169,170</sup> The arbitral tribunal took the following details into account: (i) HELNAN (the management service provider) and EGOTH (the Hotel owner) signed a management contract in 1996 for 26 years; (ii) through an amendment of the contract, EGOTH was authorized to sell the hotel in which HELNAN was also allowed either to continue providing its services or give up its rights in return for sufficient compensation; (iii) the hotel was downgraded (from 5 to 4 stars) by the Egyptian Ministry of Tourism after several inspections; (iv) an arbitration request was submitted by EGOTH before a national arbitral tribunal wishing the termination of the contract due the downgrade; (v) the arbitral tribunal decided to declare the contract terminated due to the impossibility of execution; (vi) HELNAN was ordered to be compensated, the compensation was paid, and HELNAN was forced to discontinue with the management of the hotel;<sup>171</sup> (vii) HELNAN's argument about the effects of Egyptian government's regulatory conduct and its 'orchestrated' administrative decisions effecting the interests of HELNAN;<sup>172</sup> and (viii) the violation of Egypt's obligations under the Egypt-Denmark BIT.

In dealing with the question of the applicable law, the tribunal emphasized that in order to determine whether a violation of the treaty was committed, it needed to consider whether the violation also involved the ruling of a domestic issue by a national court. In

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<sup>169</sup> See paragraph 3.

<sup>170</sup> A request for arbitration was submitted on 8 March 2005 against Egypt for the breach of the Egypt-Denmark BIT provisions, specifically 'Fair and Equitable treatment'; 'Full Protection and Security'; and 'Expropriation without compensation'. See paragraph 51.

<sup>171</sup> See paragraphs 3-8.

<sup>172</sup> See paragraphs 50-53.

such a case, it required that the interpretation and application of such a domestic issue is ‘*primarily*’ within competence of the host state’s courts.<sup>173</sup>

Nonetheless, the tribunal considered the possibility of discarding the rule of *res judicata* to explore the possibility of making a *De Novo* review ‘in the light of the requirements of fair and equitable treatment’.<sup>174</sup>

Furthermore, the tribunal quoted the CME v Czech Republic Final Award (2003) to support this idea. This award was cited to emphasize the idea which states that ‘the fact that one tribunal is competent to resolve a dispute does not necessarily affect the authority of another tribunal to resolve the same dispute; *res judicata* always requires a previous decision by a competent authority’.<sup>175</sup>

Furthermore, the tribunal highlighted the need to consider the Egyptian government’s actions in order to determine whether these actions affected the existence of the management contract and therefore constituted a violation of the treaty’s provisions.<sup>176</sup> In this regard, the tribunal not only summarized HELNAN’s position by drawing attention to the fact that (i) Egypt made an improper and abusive use of its authority;<sup>177</sup> and (ii) the Ministry’s (of Tourism) inspections were unlawful due to the lack of conformity with accepted policy and practice (customary practice);<sup>178</sup> but the tribunal also assessed the conduct of the Ministry by considering the number of officials carrying out the inspections, the time to send the inspections report, the content of the Ministry’s communications, and the downgrading decree.

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<sup>173</sup> See paragraph 105.

<sup>174</sup> See paragraph 108.

<sup>175</sup> See paragraph 122.

<sup>176</sup> See paragraph 119.

<sup>177</sup> See paragraphs 132 and 136.

<sup>178</sup> See paragraphs 134 and 138.

Finally, the arbitral tribunal decided that the regulatory conduct of the Egyptian government did not constitute a violation of the treaty provisions.<sup>179</sup> Additionally, the tribunal recognized the need to challenge the legality of the Ministry's downgrading decision before the Egyptian administrative courts.<sup>180</sup>

In this case, the arbitral tribunal recognized the jurisdiction of the domestic courts (i.e., internal forum) to settle any legal dispute arising from the acts of an organ belonging to the state, such as the Egyptian Ministry of Tourism. This tribunal reaffirmed the public law theory which states that the principle of legality must reign in any legal system to facilitate the determination of the legality of a state's conduct. Thus, the application of this principle should be considered by any arbitrator to decide upon the jurisdiction of an arbitral tribunal. Therefore, it can be affirmed that the fulfilment of this principle is a *sine que non* requisite for any claimant in order to resort to an international jurisdiction when she/he feels that her/his personal rights have been affected can claim the reestablishment of his/her legal situation infringed before the respective authority.

xxii. *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award*

This dispute arose out of two contracts to carry out works on bridges and roads in Albania and the consequent violation of the Albania-Greece BIT provisions.<sup>181,182</sup> The tribunal in this case considered the following points before arriving at a conclusion: (i) the severe civil disturbances in Albania during March 1997; (ii) the theft and destruction of the Claimant's equipment; (iii) the acceptance of responsibility for the risk of losses due to civil disturbance by the Albanian Government, through a

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<sup>179</sup> See paragraph 147.

<sup>180</sup> See paragraph 148.

<sup>181</sup> See paragraph 12.

<sup>182</sup> On 1 August 2007, a request for arbitration was submitted against Albania for the breach of the Albania-Greece BIT. See paragraph 4.

contractual provision; (iv) the Claimant's request of losses in money; (v) the agreement between the parties concerning the amount of compensation; (vi) the written request made by the Albanian Minister of Public Works to the Minister of Finance requesting the payment of the amount agreed by the parties; (vii) the rejection by the Minister of Finance to make the payment due to the fact that the Ministry "cannot carry out the obligations of [other public institutions] as a result of their contractual relations, unless funds are approved for that purpose by the Council of Ministers."<sup>183</sup> (xix) the period of 10 years without payment from the minister of finance; (x) the rejection by the Albanian Court of the Claimant's expectation of payment based on the alleged declaration by the Minister of Finance; and (xi) the Claimant's appeal of the Albanian Court's decision to the Supreme Court and the subsequent abandonment of this appeal action.

In assessing the tribunal's jurisdiction, the tribunal drew attention to the need for challenging the Minister of Finance's rejection as 'an arbitrary act'.<sup>184</sup> Additionally, the tribunal stated that '[t]he [Albanian] courts did not deny the [Claimant's petition] on the grounds that the Minister's posture was legally justified... [but]... the risk of loss was unenforceable.'<sup>185</sup>

Moreover, the tribunal stated that '[t]he Ministerial veto was apparently not an impediment to recovery [of the money] in the courts.'<sup>186</sup> Finally, the tribunal asserted that once a legal conflict has been taken to national courts, its fundamental basis cannot

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<sup>183</sup> See paragraph 2.

<sup>184</sup> See paragraph 65.

<sup>185</sup> See paragraph 66.

<sup>186</sup> See paragraph 66.

be used ‘as the foundation of a Treaty claim [due to the fact that the same contention it is no] longer permitted to be raised before ICSID.’<sup>187</sup>

In relation to the merits of the case, namely the international standards of full security and protection and denial of justice, the tribunal found that there was confusion between the breach of treaty provisions and the failure to provide a remedy.<sup>188</sup> In this respect, the tribunal held that ‘[i]nternational courts and tribunals would have to make *ad hoc* assessments based on their evaluation of the capacity of each state at a given moment of its development’ otherwise international law would not provide incentives ‘for a state to improve’.<sup>189</sup> For this reason, the tribunal deliberated on the formation of a state’s legal system in accordance with the rule of law.<sup>190</sup>

The tribunal finally concluded that it was not permitted, at the international level, to expound upon the alleged national denial of justice due the fact that the matter had not been previously taken to the host state’s highest court.<sup>191</sup>

This case serves as evidence – once again– of an arbitral tribunal recognising the jurisdiction of the domestic courts (i.e., internal forum) to settle the legal disputes derived from the acts belonging to an organ of the state, such as the Albanian Ministry of Finance. Furthermore, this tribunal also reaffirmed the public law theory regarding the adherence to the principle of legality which should rule in any legal system, including the application of this principle to the arbitral tribunals’ functions. In other words, this suggests the application of the principle of legality in order to determine the jurisdiction of the tribunal. In summary, the fulfilment of this principle should be

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<sup>187</sup> See paragraph 67.

<sup>188</sup> See paragraph 84.

<sup>189</sup> See paragraph 76.

<sup>190</sup> See paragraph 77.

<sup>191</sup> See paragraph 98.

considered a *sine que non* prerequisite for any potential claimant before resorting to an international jurisdiction.

**d. Principle of the public administration's discretionary power and other related principles**

This sub-section largely refers to the principle of the public administration's discretionary power. The principle of discretionary power can be understood in this context as 'the possibility that is given by law to an official, to adopt measures in accordance with his/her appreciation of the opportunity and convenience, where he/she can normally adopt various decisions, that *in accordance with the appreciation of the facts and with the finality of the norm*, all, if they are applied, could be equally fair.'<sup>192</sup> (Emphasis added).

Perhaps, it is also fitting to revisit and re-iterate that one of the main objectives of this domestic principle is to provide the state (i.e., public administration) with certain flexibility to adapt its performance to those vivid, dynamic and changing realities that it has to face in order to protect and promote both the public interest and national welfare. This flexibility also includes the state's ability to adapt and deal with cases/situations that it could not have foreseen.<sup>193</sup>

This principle is one of the most controversial principles of administrative law in terms of its scope, and, for which, its application simultaneously some principles of international investment law seems to cause an issue. One of the reasons for this controversy, for example, could be due to the fact that the scope and application of this principle of administrative law is frequently in conflict with international investment

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<sup>192</sup> See Brewer Carias, *supra* note 24, on page 26. Translated into English by the author.

<sup>193</sup> See Chapter II, Sub-section e (ii) Principle of the Public Administration's Discretionary Power.

law standards of treatment, in particular with the principle of fair and equitable treatment.

This legal conflict is also fuelled by taking into consideration the international legal notions of *abuse of power* and *unlawful, arbitrary or discriminatory* regulatory conduct of the host state.<sup>194</sup> Thus, in this situation, the consideration of the regulatory conduct of the state as an arbitrary or unlawful conduct could not only be connected with the legal provisions of domestic public law, but also with the legal provisions of public international law.

Therefore, this legal conflict arises from the dual-role of the state under a given investment situation, i.e., due to its role as a contracting state to a BIT and due to its role as the head of its public administration.

The importance of this legal conflict is also evident when this domestic legal principle and international law principles and notions are considered in treaty-based regulatory disputes. Consequently, this arbitral mechanism implies a revision of the state's regulatory conduct, only in accordance with the scope and provisions of a given BIT (i.e., it creates a possible conflict between the host state and foreign investor's interests).

However, it is well known in public domestic law that the scope and interpretation of this domestic principle cannot be isolated from the *obligatory* reference to the principle

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<sup>194</sup> In this regard, it has been stated that 'the disappointment of legitimate expectations must be sufficiently serious and material. Otherwise, any minor misconduct by a public official could go to the jurisdiction of a treaty tribunal.' See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 2, on paragraph 14. See also B. Kingsbury, N. Krisch, and R. B. Stewart, *The Emergence of Global Administrative Law*, Vol. 68 *Law and Contemporary Problems* (Summer/Autumn 2005); and, E. Petersmann, *Judging Judges: From 'Principal-Agent Theory' to 'Constitutional Justice' in Multilevel 'Judicial Governance' of Economic Cooperation among Citizens* *Journal of International Economic Law* Vol. 11 No. 4 (2008); and C. H. Schreuer, *Protection against Arbitrary or Discriminatory Measures* in C. Rogers, and R. Alford, *The Future of Investment Arbitration* (Oxford University Press, UK, 2009), pages 183-198.

of legality. This latter principle provides the necessary legal grounds for the correct exercise of such discretionary power by any national official. Hence, in cases concerning the absence of these legal grounds, the exercise of this discretionary power by any official could be quashed and declared illegal or nullified by a domestic court.

As already mentioned, the problem arises when the exercise and the legal consequences of this discretionary power/function need to be reviewed by an international investment tribunal, as there could be a risk of *de-contextualizing* this exercise from the social-economic reality of a state.<sup>195</sup> Perhaps it can be argued that this is one of the reasons why this practice may be creating a sense of political reluctance – at different levels– to the current international investment arbitration system by developing countries (see Chapter VI).

In summary, it is significant re-iterate that this principle is not only interconnected with the principle of legality but also with other principles of administrative law. Generally speaking, these other related principles can be identified as proportionality (i.e., a balance between ‘the administrative measure taken and the end to be achieved’<sup>196</sup>); equality before the law (i.e., the same legal status of individuals established by the law<sup>197</sup>); the public administration’s good faith (i.e., mutual administration/individuals respect<sup>198</sup>); and, the duty to give reasons (i.e., ‘any administrative decision must be accompanied by reasons’ to guarantee the private-individual right of defence<sup>199</sup>).

Based on the foregoing ideas of this sub-section, consideration will be given as to how different international arbitral tribunals refer to factual situations that could also be

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<sup>195</sup> See P. Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, Oxford and Portland, Oregon, 2009).

<sup>196</sup> See Chapter II, Sub-section e (iii) Principle of Proportionality.

<sup>197</sup> See Chapter II, Sub-section e (v) Principle of Equality before the Law.

<sup>198</sup> See Chapter II, Sub-section e (vi) Principle of Public Administration’s Good Faith.

<sup>199</sup> See Chapter II, Sub-section e (vii) Principle of the duty to give reasons (motivation).



encapsulated within the scope of the principle of the public administration's discretionary power and, in some cases, within the ambit of some other related principles of administrative law, when the regulatory conduct of a host state is required to be reviewed by public law adjudicators.

*i. Waste Management, Inc v. Estados Unidos Mexicanos (ICSID Case No. ARB(AF)/00/3) April 30, 2004 – Final Award*

In this case, when the tribunal analyzed the impact of the governmental measures adopted by Mexico in relation to Acaverde's assets, in the scope of the standard contained in article 1110 of the NAFTA (i.e., the determination of whether Mexico's conduct was equivalent to an expropriation), it took into consideration the content of a public declaration given by Acapulco's Mayor. The Claimant had argued that this declaration '*effectively repealed the law*'.<sup>200</sup> However, the tribunal disagreed with this argument.

It is crucial to emphasize that – at the international level– there is an assumption that an official's declarations unequivocally give rise to legitimate expectations.<sup>201</sup> In relation to the legal value of a declaration given by a public official, it is important to stress that, in administrative law, this type of declaration does not necessarily constitute a legal act equivalent to a formal administrative act (i.e., an act of legal effect); unless it has been expressly established by law. Consequently, based on the principle of legality, the adoption of an official act must follow the legal procedural steps set out in a domestic law system in order to acquire general or particular legal effects.

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<sup>200</sup> See paragraph 161.

<sup>201</sup> See, e.g., *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 2; and *Waste v. Mexico* (2004), *supra* note 11, paragraph 161.

This international idea concerning official declarations arises from the different concepts on this issue which vary from one jurisdiction to another. For example, under the French administrative legal system, an official act will only constitute an administrative act if it has followed the steps established by law. This compares with the situation under the British administrative legal system in which an assurance made by an official may give rise to legitimate expectations.<sup>202</sup>

An official's freedom, as a part of his discretionary power, to deliver public speeches and opinions related to a particular investment (even in the exercise of his/her public functions) needs to be considered by arbitral tribunals with special awareness of the fact their arbitral decisions on this issue may affect the exercise of the sovereign power of the state as well as its international responsibility.

A reflection on this issue is found in the arbitral tribunal's opinion, when it stated: '[i]ndividual statements of this kind made by local political figures in the heat of public debate may or may not be wise or appropriate, but they are not tantamount to expropriation *unless they are acted on in such a way as to negate the rights concerned without any remedy*.'<sup>203</sup> (Emphasis added). Moreover, it has been stated that '[e]ncouraging remarks from government officials do not of themselves give rise to legitimate expectations.'<sup>204</sup>

*ii. Metalclad Corporation v. Estados Unidos Mexicanos (ICSID Case No. ARB (AF)/97/1) August 30, 2000 – Final Award*

In considering the application of Article 1105 of the NAFTA (i.e., fair and equitable treatment), the tribunal emphasized the administrative law conflict of competences

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<sup>202</sup> See Principle of Legal Certainty and Legitimate Expectation. chapter II, Sub-section 'e', point (iv).

<sup>203</sup> See paragraph 161.

<sup>204</sup> See A. Newcombe, and L. Paradell, Law and Practice of Investment Treaties – Standards of Treatment (Wolters Kluwer – Law & Business, Austin, Boston, Chicago, New York and The Netherlands, 2009), on page 281.

between the federal and municipal governments to grant construction permits, and in particular to authorize the construction and operation of hazardous waste landfills, that was at issue in this case.<sup>205</sup>

According to this decision, the tribunal indicated that this administrative law conflict of competences also represented a limitation on the discretionary power of both federal and municipal governments in relation to the scope of their environmental powers. Finally, the tribunal reached the conclusion that ‘... the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government.’<sup>206</sup>

Normally, a conflict related to the competences of different government entities is addressed by the highest national court (i.e., the supreme court or tribunal). Nevertheless, the tribunal reached the conclusion that the municipality had acted *outside* its authority and therefore Metalclad was not fairly or equitably treated (and subsequently, was indirectly expropriated<sup>207</sup>) due to the denial of the required permit by the municipality of Guadalcazar.<sup>208</sup> In addition, the tribunal stated that ‘the municipality’s insistence upon and denial of the construction permit in this instance *was improper*’<sup>209</sup> and ‘*Mexico failed to ensure a transparent and predictable framework...*’<sup>210</sup> (Emphasis added).

As a result of this case, it is important to stress that the fact that the public administration exercises its discretionary power does not mean that an investor is not compelled to comply with the legal framework of a state. Furthermore, legal security is

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<sup>205</sup> See paragraphs 74-101.

<sup>206</sup> See paragraph 161.

<sup>207</sup> See paragraph 112.

<sup>208</sup> See paragraph 101 and 106.

<sup>209</sup> See paragraph 91.

<sup>210</sup> See paragraph 99.

always guaranteed by the state when the investor complies with the regulatory framework of that particular state. For example, with regard to the construction and operation of hazardous waste landfills, the state guarantees the investor that, once they have carried out all required administrative procedures, the necessary legal security will be given by guaranteeing the investor that a different business (e.g., houses, hotel, etc) will not be allowed to be established on the same area of construction.

*iii. International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules) January 26, 2006 – Final Award*

In evaluating the role of Chapter Eleven of the NAFTA in this case, the tribunal affirmed that Mexico: (i) had an ample ‘space’ for regulation; (ii) can permit or prohibit any form of gambling; and (iii) had ‘a wide discretion with respect to how it carries out [gambling] policies by regulation and administrative conduct.’<sup>211</sup> The tribunal further found that these observations did not contradict the NAFTA provisions.

Although the arbitral tribunal in this case did acknowledge the discretionary power of the state, it did not make any further reference to the scope of this domestic principle. On the contrary, the tribunal opted to consider the national conduct of the state as a ‘fact’ rather than exploring the scope of this principle of discretionary power of the state which has been extensively investigated under domestic law.<sup>212</sup>

Similarly, the arbitral tribunal wasted the opportunity of making a reference to one of the related principles of discretionary power, i.e., the principle of equality before the law, when it dealt with the notion of national treatment as established by Article 1102 of the NAFTA.<sup>213</sup>

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<sup>211</sup> See paragraph 127.

<sup>212</sup> See paragraph 127.

<sup>213</sup> See paragraphs 168-183.

Furthermore, in spite of the recognized illegality of the business in question, the tribunal still considered the allegation made by the Claimant of having received less favourable treatment compared to those national investors in the same area of investment. In this context, it stated that ‘Thunderbird [had] not sufficiently established – not even on a *prima facie* basis – that the EDM investments were treated, *in like circumstances*, worse than those of Mexican nationals.’<sup>214</sup> (Emphasis added).

Consequently, it must be stated that the tribunal missed out on a great opportunity to make a reference to the domestic principle of equality before the law. If this principle had been applied in this circumstance it would have advocated the same legal status for both national and foreign investors: (i) before the law, and (ii) with regard to the legal circumstances and conditions received. Moreover, it is also important to mention here that the investor cannot use a right based on an illegal activity carried out either by national or international investors.

*iv. International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion*

The dissenting arbitrator through the long-text of this separate opinion, stated that the ‘three inter-related and consecutive measures of SEGOB’ (e.g., *solicitud*, *oficio*, and subsequent conduct) constituted a violation of legitimate expectations under Article 1105 of the NAFTA.<sup>215</sup> The arbitrator argued that public authorities should respect legitimate expectations that were created for individuals, in particular if they were the basis for an investment.<sup>216</sup>

He continued his opinion by arguing that the same public authorities should also *refrain from reversing* an administrative measure after such a measure was taken into

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<sup>214</sup> See paragraph 178.

<sup>215</sup> See paragraph 23.

<sup>216</sup> See paragraph 27.

consideration in carrying out a given investment.<sup>217</sup> This serves to suggest that the arbitrator was proposing a kind of international limitation on the discretionary power of the state to carry out changes to its domestic public-policy.<sup>218</sup> Thus, the arbitrator overlooked the subject matter of the principle of discretionary power since he did not take into consideration the flexibility that is granted to the public administration to regulate in unforeseen situations. Although, to his credit, he did acknowledge that the law (both national and international) is not static.

The arbitrator expressly stated that the scope of administrative law principles and its implications were not ‘well established’ and were contradictory.<sup>219</sup> However, he did recognize the importance of referring to the common principles in the main administrative law systems for the interpretation of BITs.<sup>220</sup>

In evaluating the scope of the legitimate expectations principle, in accordance with international law standards, the arbitrator, despite the already acknowledged *illegal nature* of the investment according to the Mexican law, insisted that the Claimant had received less favourable treatment in comparison to other national investors in the same field and who were subject to the same circumstances and conditions. It is important to re-emphasize that an investor should not be allowed to argue a right based on an illegal activity.

Finally, the arbitrator made references to the notion of the principle of equality before the law, by stating ‘...the domestic investor... was... “best treated” by the integral

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<sup>217</sup> See paragraph 27.

<sup>218</sup> ‘Each state has the right freely to choose and develop its political, social, economic and cultural systems’. UNGA Res. 2625 (XXV) 1970; quoted by Somarajah, *supra* note 1, on page 76.

<sup>219</sup> See paragraph 28.

<sup>220</sup> See paragraph 28.

Mexican (administrative and judicial) system.<sup>221</sup> Nonetheless, such a reference was not further considered and expanded upon by the arbitrator throughout his analysis. He did however further state that ‘[it was difficult] to know what happens exactly in the “black box” of government administration, in particular in sensitive matters and where domestic competitors are linked with government services against foreign competitors.’<sup>222</sup> With regard to this observation made by the arbitrator, it can be noted that he failed to make any reference to the principle of the public administration’s good faith. On the contrary, his observation infers bad faith on the part of the state, without any supporting evidence. However, curiously, he did state that the principle of legitimate expectations formed part of the international principle of good faith<sup>223</sup>.

*v. Corn Products International, INC. v. Los Estados Unidos Mexicanos  
(ICSID Case No. ARB(AF)/04/01) January 15, 2008 – Decision sobre Responsabilidad*

In this case, the arbitral tribunal made references to two principles of administrative law, namely the principle of the administrations discretionary power, and equality before the law.

Firstly, with regard to the principle of the administration’s discretionary power, the arbitral tribunal acknowledged Mexico’s discretionary power to adopt fiscal measures in order to protect the Mexican sugar industry ‘by encouraging increased consumption of sugar’.<sup>224</sup> The tribunal stated that detrimental and discriminatory governmental measures did not necessarily constitute an expropriation, unless their intention was to destroy the investment.<sup>225</sup> Despite these significant observations, the tribunal did not make any further reference to the content of this principle within the analysis of the

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<sup>221</sup> See paragraph 2.

<sup>222</sup> See paragraph 104.

<sup>223</sup> See paragraph 25.

<sup>224</sup> See paragraph 42.

<sup>225</sup> See paragraph 93.

case, apart from the acknowledgement of the situation suffered by the Mexican sugar producers.<sup>226</sup>

Additionally, it is of significance to note that when the tribunal considered the national treatment claim under article 1102 of the NAFTA, it made reference to Mexico's argument on the necessity and discretion of adopting governmental measures in order to alleviate and resolve the impact of the financial crisis on the national sugar industry.<sup>227</sup> Hereafter, the tribunal did not make any further reference to this principle, except when it asserted that (i) '[t]he problem with [Mexico's] argument is that it confuses the nature of the measure taken with the motive for which it was taken',<sup>228</sup> and (ii) that the measure could be equivalent to a violation of the article 1102. Conclusively, the tribunal completed by stating that '[d]iscrimination does not cease to be discrimination... because it [was] undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary.'<sup>229</sup>

Lastly, the tribunal frequently referred to the principle of equality before the law. Most significantly, this reference was made when the tribunal evaluated the scope of national treatment in accordance with Article 1102 of the NAFTA, as it distinguished between 'non-discrimination in matters of trade' and 'non-discrimination in matters of investment'.<sup>230</sup> In this context, the tribunal pointed out three factors that needed to be taken into consideration in order to determine whether an investment has been discriminated against by a host state. These factors were (i) the host state's treatment,

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<sup>226</sup> See paragraph 129.

<sup>227</sup> See paragraph 104.

<sup>228</sup> See paragraph 142.

<sup>229</sup> See paragraph 142.

<sup>230</sup> See paragraph 112.



(ii) ‘in like circumstances’, and (iii) a less favourable treatment compared to that accorded to the comparator.<sup>231</sup>

Furthermore, when the arbitral tribunal evaluated the alleged violation of Article 1102 of the NAFTA (National Treatment), it took into consideration whether the investor was in a similar circumstance to the Mexican sugar producers through the exercise of comparing foreign and national investors that operated in the same business or economic sector.<sup>232</sup> In this regard, the tribunal reached the conclusion that the purpose of the tax was ‘avowedly’ to alter the terms of competition between these two competitors.<sup>233</sup>

vi. *Perenco Ecuador LTD v. Republica del Ecuador and Empresa Estatal Petroleos del Ecuador (ICSID Case No. ARB/08/6) May 8, 2009 – Decision sobre Medidas Provisionales*

The arbitral tribunal in this decision expressly recognized its power to limit the discretionary power of the state. In this regard, it pointed out that an ICSID tribunal is empowered to restrict the sovereign freedom of the state to act as it wished. Therefore, the tribunal in this case considered that it was empowered to grant interim measures to restrain a host state: (i) from enforcing a law; or (ii) from enforcing or seeking a local judgment.

The main argument to be taken into consideration is that despite the sovereign power of the state to enact laws, it did not inhibit the arbitral tribunal to exercise its faculties to grant interim measures.<sup>234</sup>

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<sup>231</sup> See paragraph 117.

<sup>232</sup> See paragraph 3.

<sup>233</sup> See paragraph 120.

<sup>234</sup> See paragraph 50.

Ultimately, the tribunal recommended interim measures against Ecuador, including the imposition of a restriction on the state from taking any legal actions against Perenco and a further restriction on the state to refrain from unilaterally amending, rescinding, terminating, or repudiating public-law contracts (i.e., the participation contracts).<sup>235</sup> Obviously, in the analysis of this award, the arbitral tribunal did not take the principle of legality into consideration or any other administrative law principles such as the principle of discretionary power of the state, which may have influenced it to reach a different outcome.

vii. *Azurix Corp. v. la Republica Argentina (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award*

Throughout this award, the arbitral tribunal made references to the content of some principles of administrative law, e.g., discretionary power and proportionality. With regard to the former principle, the tribunal analyzed the conduct of various Argentinean public authorities. It decided to assess the regulatory conduct of the Buenos Aires Province in order to determine which actions were performed: (i) in the exercise of its public authority or (ii) as a party to a contract.<sup>236</sup> The tribunal, despite considering that most of the controversial matters were mainly based on the interpretation of the concession agreement,<sup>237</sup> stated that the conduct of the provincial authorities had contributed to the algae crisis.<sup>238</sup> The tribunal established that the Province had performed its actions in the exercise of its public authority.<sup>239</sup> Finally, the tribunal expanded on its understanding of the discretionary power of the state and its

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<sup>235</sup> See paragraph 79.

<sup>236</sup> See paragraph 68.

<sup>237</sup> See paragraph 114.

<sup>238</sup> See paragraph 144.

<sup>239</sup> See paragraph 144.

commitment to take care of and protect the national public interest (i.e., the public health).<sup>240</sup>

In respect to the principle of proportionality, when the tribunal evaluated the effect, intent and duration of the expropriation measures adopted by Argentina, it put emphasis on the need to assess whether a legitimate governmental measure could give rise to a compensation claim, even if it was taken to serve a public purpose.<sup>241</sup> In reaching a verdict on whether the Argentinean measures were expropriatory, it cited the jurisprudence of the European Court of Human Rights in terms of proportionality. The tribunal consequently stated that a governmental measure should keep ‘a reasonable relationship of proportionality between the means employed and the aim sought to be realized’.<sup>242</sup> However, the tribunal did not provide a further explanation of the scope of this principle.

The tribunal simply submitted that (i) this proportionality would not exist if a person concerned *bears an individual and excessive burden* and (ii) nationals should support a greater burden of the public interest than non-nationals due to the fact that non-nationals do not participate in the election of the country’s leaders.<sup>243</sup>

*viii. MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile (ICSID Case No. ARB/01/7) May 25, 2004 – Final Award*

In this award, when the tribunal drew attention to the preliminary considerations of its final decision, it expressly recognized the discretionary power of the Chilean government to grant permits and also to decide on its urban policies and legislation.<sup>244</sup>

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<sup>240</sup> See paragraph 144.

<sup>241</sup> See paragraph 310.

<sup>242</sup> See paragraph 311.

<sup>243</sup> See paragraph 311.

<sup>244</sup> See paragraph 98.

In evaluating the claimant's submission concerning Chile's failure 'to grant necessary permits', the tribunal asserted that '[a]ll that an investor may expect is that the law be applied'.<sup>245</sup>

With this statement, the tribunal established that (i) the modification of the PMRS was entirely within Chile's discretionary power,<sup>246</sup> and (ii) by not changing the Chilean PMRS, Chile did not breach the BIT's provisions.<sup>247</sup>

*ix. Occidental Exploration and Production Company v. The Republic of Ecuador (London Court of International Arbitration Administered Case No. UN 3467) July 1, 2004 – Final Award*

In considering 'the claim of impairment' submitted by the Claimant, the tribunal resorted to a definition of *arbitrariness* as a way to assess the discretionary power of the state to modify the tax regime. The tribunal quoted the Lauder tribunal which referred to a definition of 'arbitrary' from Black's Law Dictionary. This definition in relation to an arbitrary act describes this type of act as being '...founded on prejudice or preference rather than on reason or fact.'<sup>248</sup> Based on this definition, the tribunal also acknowledged that there may be some forms of arbitrariness even in the case when there is no intention on the part of an administrative entity.<sup>249</sup>

In addition, the tribunal referred to the administrative principle of law known as the principle of equality before the law. Thus when dealing with the 'the claim to no less favorable treatment', it stated that "in like situations" cannot be interpreted in the narrow sense advanced by Ecuador'.<sup>250</sup> This statement was made in response to the

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<sup>245</sup> See paragraph 205.

<sup>246</sup> See paragraph 199.

<sup>247</sup> See paragraph 162.

<sup>248</sup> See paragraph 162.

<sup>249</sup> See paragraph 163.

<sup>250</sup> See paragraph 173.

Claimant's allegation of the violation of the National Treatment obligation<sup>251</sup> which was refused by Ecuador owing to the fact that it considered that the Claimant was not 'in [a] like situation to companies in the same sector' and the 'whole purpose' of the VAT was to ensure conditions of competition but only between companies in the same sector.<sup>252</sup>

*x. Helnan International Hotels A/S v. The Arab Republic of Egypt (ICSID Case No. 05/19) July 3, 2008 – Final Award*

In addressing the issues in this case, the arbitral tribunal made references to two principles of administrative law, namely the principle of the public administration's discretionary power and the principle of the public administration's good faith.

On the subject of the first principle, the arbitral tribunal made references to the state's discretionary power to downgrade the Shephard hotel status through the Ministry of Tourism. The Claimant had argued on this point that the use of this discretionary power was 'an improper use of its authority', as well as describing the act as 'discriminatory'.<sup>253</sup> Additionally, the Claimant alleged that in consequence Egypt had violated the Egypt-Denmark BIT provisions.<sup>254</sup> It must be stressed that the arbitral tribunal did not make any broad comment on this principle; except to acknowledge it. The tribunal considered that Egypt had the right to downgrade the hotel.<sup>255</sup> With this declaration, the tribunal limited itself to state that the Claimant did not 'challenge the downgrading before the competent Egyptian administrative courts.'<sup>256</sup>

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<sup>251</sup> See paragraphs 168-170.

<sup>252</sup> See paragraph 171.

<sup>253</sup> See paragraphs 55-132.

<sup>254</sup> See paragraph 55.

<sup>255</sup> See paragraph 162.

<sup>256</sup> See paragraph 148.

In relation to the second principle, the arbitral tribunal summarized the Claimant's argument concerning the suspected bad-faith action by Egypt to affect its investment. The Claimant argued that Egypt was 'deliberately abusing its sovereign powers'.<sup>257</sup> Similarly, the arbitral tribunal expressed its doubts about the good faith behind Egypt's inspections, which were carried out before downgrading the hotel's status.<sup>258</sup> The tribunal asserted its doubts on the good faith of Egypt by asserting that in its opinion Egypt had 'played a significant role in the implementation of a plan aiming at terminating the management contract'.<sup>259</sup>

*xi. Aguaytia Energy LLC v. Republic of Peru (ICSID Case No. ARB/06/13) December 11, 2008 – Final Award*

In analysing the 'developments between 1996 and 2005 in the parties' contractual relationship, the tribunal referred to Article 39 of the Peruvian Legislative Decree of 13 November 1999. This article stated that judicial stability agreements 'cannot be unilaterally amended or terminated by the State'.<sup>260</sup> The tribunal considered that, despite the fact that a stability agreement can constitute a state's guarantee against future changes of law, the level of protection given to foreign investments will 'be resolved solely by the Peruvian authorities in applying the non-discrimination provisions of the Constitution and the specific laws applicable...'.<sup>261</sup>

Thus, it can be suggested that the arbitral tribunal not only referred to the principle of discretionary power of the state, but also to the interconnected principle of equality before the law. In support of this inference, the arbitral tribunal also referred to Article 2 of the Peruvian Legislative Decree 662. This article stated that foreign and national

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<sup>257</sup> See paragraph 62.

<sup>258</sup> See paragraph 144.

<sup>259</sup> See paragraphs 156 and 160.

<sup>260</sup> See paragraph 48.

<sup>261</sup> See paragraphs 92 and 96.

investors have the same rights and obligations before the law, except for those limitations and exceptions established in the Peruvian constitution.<sup>262</sup>

Finally, in spite of the Claimant's argument concerning the alleged constitutional discrimination, the arbitral tribunal found that a stability agreement guarantees 'the constitutional right to equality before the law' between foreign and national investors.<sup>263</sup>

*xii. Piero Foresti et al. v. The Republic of South Africa (ICSID Case No. ARB (AF)/07/1) August 4, 2010 – Final Award*

In summarizing the arguments of the parties in this award, the arbitral tribunal missed the opportunity to make references to some principles of administrative law. Hence, the tribunal also missed the opportunity to support its decision by referring to the principle of discretionary power of state when it addressed the 'fair and equitable treatment and national treatment claims'. Within this context, the tribunal summarized the Claimant's argument concerning the risk of being affected by the state's discretionary measures regarding mineral rights and ownership, without elaborating on this matter.

In relation to this issue, the Claimant declared that if the tribunal accepted such a discretionary power, a state may escape its international obligations towards investors. For this reason, the Claimants further submitted that a state should be restricted from 'the possibility of rectifying [its] actions by an uncertain measure at an uncertain date'.<sup>264</sup>

The tribunal also wasted the opportunity to address two other principles of administrative law that were indirectly referred to by the parties. For example, the

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<sup>262</sup> See paragraph 47.

<sup>263</sup> See paragraph 95.

<sup>264</sup> See paragraph 95.

Respondent refers to principle of proportionality by arguing that ‘the government action in question is a rational and proportional means of pursuing legitimate public regulatory purposes’.<sup>265</sup> On the opposing side, the Claimant appeared to refer to the restriction of the principle of opportunity by arguing, as already mentioned, that the state should be refrained from ‘the possibility of rectifying [its] actions [to avoid accountability] by an uncertain measure at an uncertain date’.<sup>266</sup>

*xiii. Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award*

The sole-arbitrator tribunal in this case refers to the principle of discretionary power of the state owing to the fact that when it evaluated the jurisdiction and admissibility aspect of the case, it referred to the discretionary power of the Albanian Minister of Finance to veto a foreign investor’s payment unless the said payment had specific budgetary approval.<sup>267</sup>

Furthermore, in relation to the international standard of ‘full protection and security’, the tribunal held that ‘international courts and tribunals would have to make *ad hoc* assessments based on their evaluation of the capacity of each state at a given moment of its development’.<sup>268</sup>

*xiv. Empresas Lucchetti, S.A. et al. v. La Republica del Peru (ICSID Case No. ARB/03/4) February 7, 2005 – Final Award*

In this case, the arbitral tribunal decided that it was not necessary to take into consideration the reasons surrounding the adoption of certain administrative measures by Peru in order to protect its public interest (i.e., environmental protection policy).

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<sup>265</sup> See paragraph 75.

<sup>266</sup> See paragraph 95.

<sup>267</sup> See paragraphs 65 and 66.

<sup>268</sup> See paragraph 76.



The tribunal declared that only the fact that these administrative measures affected Lucchetti's investment interests was of relevance.<sup>269</sup> Although the tribunal held that it did not have jurisdiction to deal with the merits of the case, it could have taken the principle of discretionary power into consideration in order to understand the legal nature of the administrative measures adopted by Peru and to therefore contextualize these measures in accordance to the Peruvian government's policy and actions.

#### **e. Principle of legal certainty and legitimate expectations**

This principle has been understood domestically as 'the foundation of the legal relation between the [Public] Administration and individuals'.<sup>270</sup> It is considered to be the foundation of this relationship due to the fact that this principle establishes: (i) the necessary protection of the individual's rights against any unlawful act of the administration,<sup>271</sup> and, (ii) the private-individual expectation that the administration would not suddenly change its regulatory framework 'with immediate effect' and 'without transitional provisions', to their disadvantage.<sup>272</sup>

This unique principle has been simultaneously assimilated into the international arena as the most important domestic law principle to interpret the regulatory conduct of state in accordance with the international obligation of 'fair and equitable treatment' enshrined in many BIT provisions.<sup>273</sup> Therefore, the majority of arbitral decisions make a *constant and repeated* reference to this principle as though this principle operates in *an isolated manner* from the rest of administrative law principles. Furthermore, and somewhat worryingly, it has been said that there is a risk of considering this fair and

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<sup>269</sup> See paragraph 29.

<sup>270</sup> See Brewer Carías, *supra* note 24, on page 277.

<sup>271</sup> See Chapter II, Sub-section e) iv. Legal Certainty and Legitimate Expectation.

<sup>272</sup> See Neville Brown and Bell, *supra* note 5, on page 236.

<sup>273</sup> For a detailed study of this argument see Snodgrass, *supra* note 22, pages 1-58.

equitable treatment standard as a substitute for stabilization clauses that were neither conceived nor agreed by the parties.<sup>274</sup>

Thus, taking these observations into consideration, it may be affirmed that to determine the scope and limit of this principle could represent an interesting challenge for investment arbitrators. This is due to the fact that the application of this principle does not only require full consideration by arbitral tribunals but also has an added challenge, given that its scope has not been determined with any certainty at a national level. The unclear scope of this principle is therefore not an exclusive concern at the domestic level, as it also seems to be of concern at the international level due to the lack of a consolidated and consistent notion of this principle in arbitral practice.

In relation to this principle, it has been said that ‘[foreign investors’] expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances’.<sup>275</sup> Furthermore, it has also been stated that ‘[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is going to remain totally unchanged’.<sup>276</sup> Thus, it has been assumed that in order ‘to create legitimate expectations, state conduct needs to be specific and unambiguous... there must be an “unambiguous affirmation” or a “definitive, unambiguous and repeated” assurance’.<sup>277</sup>

In summary, this sub-section analyzes the arbitral reference to this principle by treaty-based investment tribunals, in the following arbitral awards:

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<sup>274</sup> See R. Dolzer, and C. Schreuer, *Principles of International Investment Law* (First Edition, Oxford University Press, UK 2008), on page 148.

<sup>275</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL Arbitration Rules 1976), Geneva, 17 March 2006 – Partial Award, paragraph 304.

<sup>276</sup> *Ibid.*, paragraph 305.

<sup>277</sup> See Newcombe and Paradell, *supra* note 214, on page 281.

i. *Metalclad Corporation v. Estados Unidos Mexicanos (ICSID Case No. ARB (AF)/97/1) August 30, 2000 – Final Award*

This is an illustration of those cases where the arbitral tribunals make a reference to the principle of legal certainty and legitimate expectations but in an indirect manner. In this case, the Claimant argued that he met the Governor of SLP to discuss his project of developing and operating a hazardous waste landfill and consequently had obtained the Governor's support for the project.<sup>278</sup> The Claimant also argued that he would not have bought COTERIN's assets if the approval and support for the project by federal and state officials were not given.<sup>279</sup> The project was terminated due to the absence of a municipal construction permit that was considered necessary by Mexico.<sup>280</sup> After several attempts to resolve the dispute by amicable and judicial solutions, the project was finally frustrated by the issue of an Ecological Decree declaring the project area to be a natural area for the protection of a rare cactus (the Decree also embraced the area of the landfill).<sup>281</sup>

In assessing the application of the fair and equitable treatment (Article 1105 of the NAFTA), the tribunal also referred to the principle of transparency mentioned in the introduction to the Treaty. By referring to this principle of transparency, it is reasonable to suggest that the tribunal was also indirectly referring to the principle of legal certainty and legitimate expectation. The tribunal stated:

The Tribunal understands this [principle] to include the idea that *all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party*. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose

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<sup>278</sup> See paragraph 32.

<sup>279</sup> See paragraph 36.

<sup>280</sup> See paragraphs 40-41.

<sup>281</sup> See paragraph 59.

international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, *it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.*<sup>282</sup> (Emphasis added).

Based on this statement, the arbitral tribunal highlighted that ‘[t]he absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by the NAFTA.’<sup>283</sup> Additionally, the tribunal stated that, despite the fact that the municipal construction permit had not been granted yet, the Claimant was ‘merely acting prudently’ and in ‘the full expectation that the permit would be granted’.<sup>284</sup>

Finally, the arbitral tribunal held that Mexico failed ‘to ensure a transparent and predictable framework for Metalclad’s business planning and investment’.<sup>285</sup> Therefore Mexico’s conduct amounted to an indirect expropriation in violation of Article 1110(1) of the NAFTA.<sup>286</sup>

ii. *International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules) January 26, 2006 – Final Award*

The arbitral tribunal, in reaching a conclusion in this case, devoted approximately *thirty* paragraphs to exclusively assess the principle of legitimate expectations under the scope of and in accordance with Articles 1102, 1105 and 1110 of the NAFTA. The

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<sup>282</sup> See paragraph 76.

<sup>283</sup> See paragraph 88.

<sup>284</sup> See paragraph 89.

<sup>285</sup> See paragraph 99.

<sup>286</sup> See paragraphs 104-107.

Claimant's argument concerned its reliance upon the legitimate expectations generated by SEGOB's answer (e.g., the *Oficio*) as an administrative act of government officials, and the responsibility of the state under international law for damages caused by these officials for the breach of its investment's legitimate expectations.<sup>287</sup> Conversely, Mexico denied the creation of a legitimate expectation through *Oficio* due to the advisory and not authoritative nature of the document in question.<sup>288</sup>

Nevertheless, the tribunal decided to take its final decision based on (i) the face value of SEGOB's answer, (ii) the lack of contemporaneous evidence; and (ii) the non-reliance on presumptions or inferences.<sup>289</sup> Consequently, the tribunal expressly recognised that reviewing the content of SEGOB's answer 'would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters'.<sup>290</sup>

Regardless of this recognition, the tribunal affirmed that it had the competence to assess whether SEGOB's answer gave rise to a legitimate expectation in favour of the Claimant in accordance with Mexico's obligations under Chapter Eleven of the NAFTA.<sup>291</sup>

Thus, before reaching a verdict on this issue, the tribunal considered it necessary to define *a priori* the concept of legitimate expectations, within the context of the NAFTA framework. To this end, the tribunal considered that there may be a legitimate expectation when there is '[a] situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act

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<sup>287</sup> See paragraph 138.

<sup>288</sup> See paragraphs 141.

<sup>289</sup> See paragraph 150.

<sup>290</sup> See paragraph 160.

<sup>291</sup> See paragraph 160.

in reliance [of that] expectation’.<sup>292</sup> Additionally, the tribunal stated that ‘a failure by a NAFTA Party to honour [the] expectations [created] could cause the investor (or investment) to suffer damage’.<sup>293</sup> However, the tribunal later found that SEGOB’s answer did not create a legitimate expectation under Articles 1102, 1105 and/or 1110 of the NAFTA.<sup>294</sup>

*iii. International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion*

In this separate opinion, the dissenting arbitrator, in a 135-page document, gave an in-depth analysis of the principle of legitimate expectations under international law. His main argument was based on the idea that a combination of three ‘inter-related and consecutive measures of SEGOB’, i.e., (i) *solicitud*, (ii) *oficio* and (iii) subsequent conduct, constituted a legitimate expectation in favour of the Claimant, according to the scope of the fair and equitable treatment contained in Article 1105 of the NAFTA.<sup>295</sup>

Furthermore, the arbitrator considered that such a combination of measures should have been considered a ‘green light’, i.e., the equivalent of an administrative act of the state (e.g., permits) giving the Claimant permission to carry out within Mexican territory, for their business activities, which were considered at the time to be illegal activities by Mexican law.<sup>296</sup>

The arbitrator conceived a legitimate expectation to be ‘an expectation of the investor to be caused by and attributed to the government, backed-up by an investment relying on such expectation, requiring the legitimacy of the expectation in terms of the

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<sup>292</sup> See paragraph 147.

<sup>293</sup> See paragraph 147.

<sup>294</sup> See paragraphs 148 and 166.

<sup>295</sup> See paragraphs 23 and 95.

<sup>296</sup> See paragraph 85.

competency of the officials responsible for it and the procedure for issuing it and the reasonableness of the investor in relying on the expectation'.<sup>297</sup>

The arbitrator suggested that the concept of legitimate expectations and its normative scope should be constructed under the scope of Article 1105 of the NAFTA, with particular reference to the particular circumstances of a case, thus advocating a case-by-case application.<sup>298</sup> The arbitrator also recognized that foreign investors are exposed to 'the sovereignty, the regulatory, administrative and other governmental powers of a state'.<sup>299</sup> Furthermore, it was suggested by the arbitrator that, due to the similarity between investor-state arbitration and national judicial review, a comparative analysis on the common principles of the main administrative law systems could be an important point of reference in relation to the interpretation of BITs.<sup>300</sup>

Finally, the arbitrator acknowledged that the exact scope and application of this principle of legitimate expectations is *not well established* within the international arena. Additionally he also highlighted the contradiction that exists between the meanings of this principle at national and international levels.<sup>301</sup>

*iv. Azurix Corp. v. la Republica Argentina (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award*

In this award, the arbitral tribunal devoted a complete sub-section to the principle of legitimate expectations.<sup>302</sup> One of the legal issues in this decision was the issue of whether a governmental measure could have affected the investor's legitimate expectation which was created by a contractual agreement.

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<sup>297</sup> See paragraph 1.

<sup>298</sup> See paragraphs 3 and 4.

<sup>299</sup> See paragraph 12.

<sup>300</sup> See paragraph 28.

<sup>301</sup> See paragraph 28.

<sup>302</sup> See paragraphs 316 to 323.

In assessing the alleged breach of the Argentina-USA BIT provisions, particularly the expropriation without compensation claim, the tribunal stated that ‘frustration of the investor’s legitimate expectations [takes place] when a State repudiates former assurances, or refuses to give assurances that it will comply with its obligations, depriving the investor in whole or in part, of the use or reasonably-to-be-expected economic benefit of its investment’.<sup>303</sup> Moreover, the tribunal pointed out that ‘[t]he expectations... are not necessarily based on a contract but on assurances explicit or implicit, or on representations, made by the State which the investor took into account in making the investment’.<sup>304</sup>

The arbitral tribunal also considered this principle when it examined the fair and equitable treatment claim. Within the context of this international standard of treatment, the Claimant argued that ‘the basic touchstone of fair and equitable treatment is to be found in the legitimate and reasonable expectations of the parties’.<sup>305</sup>

In response to this argument, the tribunal asserted that when the regulatory conduct of the state needs to be considered, it has to be taken by considering those elements that frustrated the ‘...expectations [of] the investor which [were] legitimately taken into account when it made the investment’.<sup>306</sup>

*v. MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile (ICSID Case No. ARB/01/7) May 25, 2004 – Final Award*

In this award, when the tribunal investigated the fair and equitable treatment claim, it took the Claimant’s consideration on the legal effect of the FIC’s approval into account. In this respect, the Claimant argued that the FIC’s approval constituted ‘the

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<sup>303</sup> See paragraph 316.

<sup>304</sup> See paragraph 318.

<sup>305</sup> See paragraph 341.

<sup>306</sup> See paragraph 372.



[necessary] approval of the investment and of the project, at the described location’, which subsequently gave them the right to develop the site.<sup>307</sup>

In response to this argument, the arbitral tribunal stated that it was the responsibility of the FIC to carry out a ‘minimum of diligence internally and externally’ to ‘give an investor the expectation that the project [was] feasible at that location from a regulatory point of view’.<sup>308</sup>

Finally, despite the fact that tribunal stated that it was a responsibility of the investor ‘to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment’<sup>309</sup> and that ‘[a]ll that an investor may expect [was] that the law be applied’<sup>310</sup>, the arbitral tribunal held that ‘[the] approval of an investment by the FIC for a project that [was] against the urban policy of the Government [was] a breach of the obligation to treat an investor fairly and equitably’.<sup>311</sup>

*vi. Occidental Exploration and Production Company v. The Republic of Ecuador (London Court of International Arbitration Administered Case No. UN 3467) July 1, 2004 – Final Award*

In this arbitral decision, the Claimant’s argument related to the refusal of the Ecuadorean government to allow OEPC to manage its investment and other connected rights. The Claimant submitted that ‘a legitimate economic expectation on which the investment was based has been undermined by the [tax] measures taken [by Ecuador]’.<sup>312</sup> However, the tribunal was not persuaded by this argument when it analyzed the Impairment claim. The tribunal did however refer to it again when it evaluated the fair and equitable treatment and the full protection and security claim.

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<sup>307</sup> See paragraph 161.

<sup>308</sup> See paragraph 163.

<sup>309</sup> See paragraph 163.

<sup>310</sup> See paragraph 205.

<sup>311</sup> See paragraph 166.

<sup>312</sup> See paragraph 159.

In this respect, the Claimant argued that ‘by revoking pre-existing decisions that were legitimately relied upon by the investor to assume its commitments and plan its commercial and business activities, Ecuador has frustrated OEPC’s legitimate expectations on the basis of which the investment was made and has thus breached the obligation to accord it fair and equitable treatment’.<sup>313</sup>

In reaction to this argument, the tribunal submitted that ‘[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment’.<sup>314</sup> Further to this, the tribunal asserted that ‘the framework under which the investment was made and operate[d] [had] been changed in an important manner by actions adopted by the SRI’.<sup>315</sup> In other words, it can be evidenced that the tribunal was persuaded by the Claimant’s argument regarding the change in the tax law ‘without providing any clarity about its meaning’.<sup>316</sup>

Ultimately, the arbitral tribunal held that Ecuador breached its obligations ‘to accord fair and equitable treatment under Article II (3) (a) of the [USA-Ecuador BIT]’.<sup>317</sup>

An important academic reflection concerning this decision is that the arbitral tribunal not only assimilates the notion of legitimate expectations with the notion of fair and equitable treatment, but integrates it with the international-law requirements of ‘stability’ and ‘predictability’.<sup>318</sup>

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<sup>313</sup> See paragraph 181.

<sup>314</sup> See paragraph 183.

<sup>315</sup> See paragraph 184.

<sup>316</sup> See paragraph 184.

<sup>317</sup> See paragraph 187.

<sup>318</sup> See paragraph 191.

vii. *Telenor Mobile Communications S.A. v. The Republic of Hungary (ICSID Case No. ARB/04/15) September 13, 2006 – Final Award.*

In this case, the Claimant argued that the Hungarian regulatory measures affected its investment contract. It stated that the contract embraced, amongst other elements, its legitimate expectation that also included a fair and equitable treatment.<sup>319</sup>

In response to this argument, the arbitral tribunal, without making further analysis on the alleged existence of the principle of legitimate expectations, stated that ‘it [was] well established that *the mere exercise by government of regulatory powers that create impediments to business or entail the payment of taxes or other levies does not of itself constitute expropriation*’.<sup>320</sup> (Emphasis added).

Finally, the tribunal held that ‘the interference with the investor’s rights must be such as to substantially deprive the investor of the economic value, use or enjoyment of its investment’.<sup>321</sup>

#### **f. Summary**

This chapter is evidence of the fact that arbitral tribunals do evaluate the domestic regulatory conduct of the state in order to determine its international responsibility mainly in accordance with the FET standard. The arbitral tribunals carry out this evaluation through the process of assessing the regulatory power of the state, which is carried out in a variety of ways. In more simple terms it has been shown that every tribunal has the freedom to establish its own methodology to analyze and decide a treaty-based investor-state dispute.

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<sup>319</sup> See paragraph 61.

<sup>320</sup> See paragraph 64.

<sup>321</sup> See paragraph 65.

As a result of this flexibility, arbitral tribunals are also free to resort to different sources of law (i.e., national and international laws). Furthermore, this freedom entitles them a choice of whether to make reference to and consider some international law principles such as the FET standard in conjunction with some principles of domestic administrative law when international regulatory disputes are in the process of being resolved .

Within this context, arbitral tribunals, through the process of evaluating the regulatory conduct of state, have made references to factual situations which could clearly be framed within the scope of some principles of administrative law, e.g., legality, discretionary power, proportionality, equality before law, legal certainty and legitimate expectations. Thus, this public law review of state regulatory conduct by arbitral tribunals can be evidenced throughout the text of this chapter, where arbitral tribunals address, each of these principles (separately or jointly in the same award) on case-by-case basis.

It is important to emphasize that despite the fact that arbitral tribunals do not make express and direct references to any of the names or scopes of the administrative law principles enumerated in Chapter II, they do discuss elements that lead to the inference that they are referring, in an indirect manner, to these principles. However, a unique exception to this indirect manner of referring to these administrative principle can be found when tribunals directly deal with the principle of legitimate expectations which has been considered (in their view) to be a part of the international fair and equitable standard of treatment.

The indirect reference to principles of administrative law can also be evidenced by the manner in which arbitral tribunals evaluate the international obligations established by an IIT in conjunction with the domestic regulatory conduct of the state. Here it can be

stated that these international obligations are in apparent conflict with the scope of administrative law principles due to their different purposes s i.e., resolving domestic regulatory disputes and resolving international regulatory disputes, respectively. This conflict could also be related to the dual role of state at the international and national levels. For example, at the international level, the state is viewed as a contracting state of a BIT, whereas at the national level, the state is the public administration, before private individuals.

Finally, it can be inferred that the principles of administrative law are interconnected with one another, as are the principles of international investment. However, this interconnection not only exists between the domestic and international principles at their own respective levels, but also between these two levels of principles. These principles are interconnected, amongst other reasons, due to the unique and indivisible nature of the law as ‘one system of norms’ (Hans Kelsen’s school).

These two sets of principles and their variety of interpretations conflict (when they should not) at the international level, particularly in treaty-based regulatory disputes. Consequently this could be to the detriment of the real interests of the contracting states of a BIT, i.e., it could be a disadvantage to their reciprocal intentions of promoting economic cooperation to their mutual benefit. This risk should be taken seriously in order for a good level of global governance to be achieved and guaranteed in the near future.

## CHAPTER VI

### REFLECTIONS ON THE INVESTOR-STATE TREATY ARBITRATION SYSTEM AND THE POSSIBILITY OF APPLYING PRINCIPLES OF ADMINISTRATIVE LAW

#### a. Introduction

During the last two decades, the international investment arbitration practice (particularly international regulatory disputes) has given rise to certain concerns and questions from some host states, particularly those from developing countries.<sup>1</sup> These questions range from political, legal and academic concerns as will be seen later on.

Within the context of these concerns and questions, it has been argued that the current arbitral practice has been compromising the legitimacy of the system itself due to the review of a state's domestic public policy and regulatory power at an international level and to the determination of a state's international responsibility arising out of the exercise of its public authority.<sup>2</sup> It is reasonable to state that these various concerns and questions have also taken place due to the continuing restriction on the freedom of the state to exercise its sovereign regulatory power and to adopt new policies in the interest of its national welfare.<sup>3</sup>

This alleged limitation upon the sovereign regulatory power of a state has been carried out by various heterogeneous arbitral interpretations of principles of international

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<sup>1</sup> For example: Bolivia; Ecuador; Venezuela; Argentina and South Africa. However this list also includes some developed countries such as Australia and the European Union.

<sup>2</sup> See M. Sornarajah, *The Clash of Globalisations and the International Law on Foreign Investment* (Centre for Trade Policy and Law, Ottawa) <<http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf>> (Last visit 07/04/2009).

<sup>3</sup> See, e.g., *Perenco Ecuador LTD v. Republica del Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6) May 8, 2009 – Decision sobre Medidas Provisionales.

investment law<sup>4</sup> – at an international level – on those sovereign rights allowing the state to regulate its domestic economy. These interpretations embrace different arbitral understandings, which have based on the various interpretations of obligations established in a given BIT, such as the interpretations of national treatment, and of fair and equitable treatment.<sup>5</sup> This argument is of particular importance within the international investment arbitration system, if it is taken into consideration that the current arbitral practice is led by the idea of evaluating a state's national regulatory conduct in accordance with international investment law principles mainly i.e., in particular, in accordance with the FET standard.

Furthermore, it can be said that these concerns can also be based on the current arbitral practice of concluding a regulatory case without sufficiently resorting to domestic law principles to due the lack of consideration afforded to those legal elements that gave grounds to the adoption of a certain regulatory measure of the state, e.g., the consideration of domestic (constitutional and administrative) law principles. Instead of considering such legal grounds, arbitral tribunals have adhered to the idea that the national conduct of a state and its legal agenda should be as a 'fact'.<sup>6</sup>

The question that must now be asked is how a certain regulatory conduct of the state can be considered as a 'fact' when the legal nature of a BIT dispute should be taken

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<sup>4</sup> See, e.g., *CME Czech Republic BV (The Netherlands) v. The Czech Republic* (2001) and *Ronald S. Lauder v. The Czech Republic* (2001); and *SGS Societe Generale de Surveillance, S.A. v. Islamic Republic of Pakistan* (2003) and *SGS Societe Generale de Surveillance, S.A. v. The Republic of the Philippines* (2004), quoted by J. Gill, *Inconsistent Decisions: An Issue to be Addressed or a fact of life*, in F. Ortino, A. Sheppard, and H. Warner, *Investment Treaty Law – Current Issues Volume 1* (British Institute of International and Comparative Law, London 2006), pages 23-28.

<sup>5</sup> See *Siemens A.G. v. Republica Argentina* (ICSID Case No. ARB/02/8) August 2, 2004 – Decision on Jurisdiction, paragraph 139.

<sup>6</sup> See *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) January 26, 2006 – Final Award, on paragraph 27. See also Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, UK, 2009), pages 69-72, pages 69-72.

into account.<sup>7</sup> In this regard, it could also be questioned whether international and national laws are completely separate from each other in terms of reviewing the unilateral power of the state.<sup>8</sup>

The current arbitral practice has given rise to a series of theories that have caught the state's attention. These concerns are based on the following factors related to current arbitral practice: (i) the idea which suggests that BIT obligations guarantee a level of 'good governance';<sup>9</sup> (ii) the need to consider political aspects of a host state;<sup>10</sup> (iii) the consideration of sensitive matters related to economic policy and foreign affairs policy by investment arbitrators;<sup>11</sup> (iv) the international responsibility of a state derived from a BIT;<sup>12</sup> (v) the consideration of not only investment matters, but issues relating to alleged corruption and criminal conduct by investment tribunals;<sup>13</sup> (vi) the obligation of the investor to fulfil the commitments and intentions of the BIT;<sup>14</sup> (vii) the risk of considering minimum misconduct by an official as a violation of a BIT provision;<sup>15</sup> (viii) the dynamic nature of international law;<sup>16</sup> (ix) the need of complementing the public purpose criterion;<sup>17</sup> (x) the alleged disproportional burden upon national individuals in comparison with foreigners, due to the fact that the foreigners do not take

<sup>7</sup> See *Azurix Corp. v. la Republica Argentina* (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award, paragraph 58.

<sup>8</sup> See the dualism and monism theories in Chapter III.

<sup>9</sup> See *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 6, on paragraph 56. See also Opinion of the Committee on Development; suggestion number 6. *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN>> (Last visit 28/04/2011).

<sup>10</sup> See *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) September 23, 2003 – Final Award, paragraph 124.

<sup>11</sup> See *Siemens v. Argentina* (2004), *supra* note 5, paragraph 57.

<sup>12</sup> *Ibid.*, paragraph 139.

<sup>13</sup> See *Azurix v. Argentina* (2006), *supra* note 7, paragraph 56. See also *Thunderbird v. Mexico* (2006), *supra* note 6.

<sup>14</sup> See *TSA Spectrum de Argentina, S.A. v. La Republica Argentina* (ICSID Case No. ARB/05/5) December 19, 2008 – Final Award, paragraph 70.

<sup>15</sup> *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion, on paragraph 13. See also *Azurix v. Argentina* (2006), *supra* note 7, paragraph 391.

<sup>16</sup> *Waste Management, Inc v. Estados Unidos Mexicanos* (ICSID Case No. ARB(AF)/00/3) April 30, 2004 – Final Award, paragraph 92.

<sup>17</sup> See *Azurix v. Argentina* (2006), *supra* note 7, paragraph 311.



part in elections;<sup>18</sup> (xi) the state's forced consent to arbitrate.<sup>19</sup> These various factors therefore serve to illustrate from where the concerns have derived, and these factors are by no means exhaustive.

Some actions have been taken recently by diverse sectors (mostly by states) to mitigate and prevent the negative effect which the current investor-state arbitration system has upon the interests of a host state at the national and international level. Examples of these actions which have been taken to mitigate the detrimental effects arising out of this arbitration system are as follows:

#### **b. State measures against the investor-state arbitration system**

The treaty-based investor-state arbitration system is currently under the legal and political scrutiny of some contracting states, particularly host states. A significant number of these host states have already taken actions or measures either to review the terms and conditions of their current BITs or to denounce or terminate them. Examples of these various state measures taken against investor-state treaty arbitration are as follows:

**Ecuador:**<sup>20</sup> The government of Ecuador decided: (i) to withdraw from the ICSID Convention,<sup>21</sup> and (ii) to request from the approval of the National Assembly to terminate some BITs as they were 'unconstitutional'.<sup>22</sup> The Ecuadorean Constitutional Court found that the provisions of the Ecuador-USA

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<sup>18</sup> Ibid., paragraph 311.

<sup>19</sup> In this case, Costa Rica was forced to accept arbitration, otherwise it would not receive funds from an International Organization. See *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID No. ARB/96/1) February 17, 2000 – Final Award.

<sup>20</sup> Organization of American States – Foreign Trade Information System – UTRS Reports (Ecuador) < [http://www.sice.oas.org/ctyindex/USA/USTR\\_Reports/2011/NTE/ECU\\_e.pdf](http://www.sice.oas.org/ctyindex/USA/USTR_Reports/2011/NTE/ECU_e.pdf) > (Last visit 05/06/2011).

<sup>21</sup> Ibid., the decision was notified to the World Bank in July 6, 2009 and became effective on January 7, 2010.

<sup>22</sup> Ibid., See also H. Rondon de Sanso, *Aspectos Jurídicos Fundamentales del Arbitraje Internacional de Inversión* (Editorial Ex libris, Caracas, 2010), on page xii.

BIT were in conflict with Article 422 of the national constitution 2008,<sup>23</sup> which establishes the principle of supremacy, thus the provisions of the BIT were considered to be ‘unconstitutional’.<sup>24</sup> Finally, the Ecuadorean National Assembly authorized the Executive to terminate some of the BITs.<sup>25</sup>

**Bolivia:** On May 2, 2007, the Bolivian government decided to withdraw from the ICSID Convention. This decision was based on the following ideas: (i) the argued bias on the part of ICSID tribunals in favour of foreign investors; (ii) the alleged antidemocratic nature of ICSID tribunals due to their closed-door policy and the non-appealable nature of their decisions; (iii) the concern about the high costs of ICSID facilities; (iv) the huge amounts of compensation awarded by ICSID tribunals in favour of foreign investors; (v) the criticized role of ICSID in trying to be both judge and jury in the same case; and (vi) the alleged violation of Article 135<sup>26</sup> (i.e., violation of the principle of submission to Bolivian law) of the Bolivian National Constitution.<sup>27</sup>

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<sup>23</sup> Article 422 is part of the Title IX (Supremacy of the Constitution), Chapter First (Principles) of the Ecuadorian Constitution and states that ‘The Constitution is the supreme law of the land and prevails over any other legal regulatory framework. The standards and acts of public power must be upheld in conformity with the provisions of the Constitution; otherwise, they shall not be legally binding.

The Constitution and international human rights treaties ratified by the State that recognize rights that are more favourable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by a public power.’ (Translated into English by the Author).

<sup>24</sup> On November 24, 2010, the Constitutional Court ruled that Article 422 of the Constitution limits the State to cede its sovereign jurisdiction through by concluding BITs. Organization of American States – Foreign Trade Information System – UTRS Reports (Ecuador) < [http://www.sice.oas.org/ctyindex/USA/USTR\\_Reports/2011/NTE/ECU\\_e.pdf](http://www.sice.oas.org/ctyindex/USA/USTR_Reports/2011/NTE/ECU_e.pdf) > (Last visit 05/06/2011).

<sup>25</sup> See, e.g., the Ecuador-Honduras BIT; the Ecuador-Dominican Republic; the Ecuador-Guatemala BIT; and, the Ecuador-Nicaragua BIT. Source: Ministerio de Relaciones Exteriores –República del Ecuador –Sistema de Tratados <<http://web.mmrree.gob.ec/sitrac/Consultas/Busqueda.aspx>> (Last visit 05/06/2011).

<sup>26</sup> Article 135 of the 1967 Bolivian Constitution concluded that: ‘All companies established for operations, development or businesses within the country shall be considered as national and shall be subject to the sovereignty, laws and authorities of the Republic’. (Translated into English by the Author). This Constitution was derogated by the Constitution of the Plurinational State of Bolivia of 2009.

<sup>27</sup> *Bolivia Decide Salir del CIADI* – Alliance for Responsible Trade < <http://www.art-us.org/content/bolivia-decide-salir-del-ciadi> > (Last visit 05/06/2011).

**South Africa:**<sup>28</sup> The South African government prepared a report that contains its official position relating to its current BIT policy. Throughout this report, the government stated that: (i) North-South negotiations were undertaken in order to favour developed countries' interests along with the interests of large, politically influential corporations; (ii) the imposition of damaging binding investment rules may affect the country's development; (iii) the failure to encourage or enhance the country's development under the application of those binding investment rules; (iv) the rights created by BITs which entitle foreign investors to seek compensation from a host state when a new regulatory measure is adopted by the latter, even if the adoption of the measure is done in the benefit of the public interest; and (v) the prevailing necessity of reviewing and scrutinizing BIT provisions in order to guarantee the country's interest and to ensure the free implementation of legitimate social and economic priorities.

**Venezuela:**<sup>29</sup> The Venezuelan government announced its intention to withdraw from the ICSID Convention. This decision was officially formalized on 25<sup>th</sup> January 2012.<sup>30</sup> Previously, the National Assembly had appealed to the Executive to do so on 2<sup>nd</sup> February 2008.<sup>31</sup> At this time, the government had also considered, in accordance with Article 25 of the Convention, the option of excluding from the jurisdiction of the ICSID Convention some sensitive national matters such as the review of the regulatory conduct of the state.

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<sup>28</sup> See Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009 <[http://www.thedti.gov.za/ads/bi-lateral\\_policy.pdf](http://www.thedti.gov.za/ads/bi-lateral_policy.pdf)> (Last visit 03/10/2009).

<sup>29</sup> See Rondon de Sanso, *supra* note 22.

<sup>30</sup> Comunicado Oficial del 25/01/2012 titulado 'Gobierno Bolivariano denuncia convenio con CIADI'. Ministerio del Poder Popular para las Relaciones Exteriores, República Bolivariana de Venezuela Venezuela <[http://www.mre.gov.ve/index.php?option=com\\_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108](http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108)> (Last visit 26/01/2012).

<sup>31</sup> *Acuerdo de la Asamblea Nacional sobre la Campaña de la Transnacional Exxon Mobil contra Petróleos de Venezuela, S.A.* de fecha 02 de Febrero de 2008; publicado en la Gaceta Oficial de la Republica Bolivariana de Venezuela No. 38.869 de fecha 13 de febrero de 2008.

Additionally, Venezuela announced its intention to terminate some BITs, in particular the Netherlands-Venezuela BIT.<sup>32</sup> This last announcement has been made due to the legal and political concerns on the abuse of the principle of legal personality by some foreign companies. Within this context, these concerns have been founded on the ‘strategic’ registration of foreign investors as Dutch companies in order to subsequently gain access to and protection from the BIT provisions.<sup>33</sup>

Lastly, Venezuela has also been evaluating the possibility of amending the existing Venezuelan investment law or promulgating a new one in order to encourage economic national development. That is to say the promulgation of a new investment law which promotes foreign investments rather than only protecting them.

**Argentina:** Between 2007 and 2010, the Republic of Argentina questioned the content of three arbitral awards given by ICSID tribunals.<sup>34</sup> These cases concerned the Argentina-France BIT and the Argentina-USA BIT, respectively.<sup>35</sup>

Argentina requested the annulment of these arbitral awards based mainly on the following arguments: (i) the tribunal was not constituted properly; (ii) the

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<sup>32</sup> This BIT was denounced by Venezuela on 30 April 2008.

<sup>33</sup> *Venezuela denuncia tratado de Inversiones con Holanda* – El Universal Website <[http://www.eluniversal.com/2008/05/01/eco\\_art\\_venezuela-denuncia-t\\_01A1549161.shtml](http://www.eluniversal.com/2008/05/01/eco_art_venezuela-denuncia-t_01A1549161.shtml)> (Last visit 25/02/2011).

<sup>34</sup> The first case was *Compañía de Aguas de Aconquija, S.A. et al v Argentine Republic* (ICSID No. ARB/97/3) August 10, 2007 – a decision on the Argentinean Republic’s request for annulment of the award which was delivered on 20 August 2007; the second case was *Sempra Energy International v Argentine Republic* (ICSID No. ARB/02/16), June 29, 2010 – a decision on the Argentinean Republic’s application for the annulment of the award; and the third case was *Enron Creditors Recovery Corp and Ponderosa Assets, LP v the Argentine Republic* (ICSID No. ARB/01/3), July 2010, 30 – a decision on the application for annulment made by the Argentinean Republic.

<sup>35</sup> The first case concerned the Argentina-France BIT, the other two cases related to the the Argentina-USA BIT.

tribunal stepped beyond its remit by not considering the applicable law; (iii) the tribunal did not deliver decisions with well-explained reasoning; (iv) the amount of compensation was wrongly calculated; (v) the lack of legitimacy surrounding one of the arbitrators; and (vi) the disregard concerning the argued *state of necessity* of Argentina caused by the financial crisis during the 90s.

Ultimately, these three requests for annulment were acknowledged, processed and decided by *ad hoc* committees in which two out of three requests were decided in favour of Argentina and consequently annulled.<sup>36</sup>

**United States of America:**<sup>37</sup> On May 14, 2009, the Committee on Ways and Means of the U.S. Congress discussed some political concerns regarding the future IIT programme and the public interest of the country, in particular the legal effects derived from the investment obligations of the NAFTA. During the 1<sup>st</sup> Session of the 111th Congress House Hearing, the following points were highlighted: (i) the requirement of more regulatory and policy space; (ii) the revision of investment protections which have been drafted too broadly; (iii) the granting of equivalent rights to national and foreign investors; (iv) the exclusive jurisdiction of national courts to resolve foreign investment matters; (v) the now limited access to ISTA; and (vi) the misuse of the investor-state arbitration mechanism to challenge legitimate measures taken in the public-interest.<sup>38</sup>

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<sup>36</sup> The first case was rejected by the arbitral tribunal and the other two cases were decided in favour of Argentina.

<sup>37</sup> U.S. House of Representatives, 111<sup>th</sup> Congress, 1<sup>st</sup> Session, Transcript, *Hearing on Investment Protections in U.S. Trade and Investment Agreements*, May 14, 2009, Serial 111-20 <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_house\\_hearings&docid=f:53473.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:53473.wais)> (Last visit 26/06/2011).

<sup>38</sup> See Alvarez, J. E., *Chapter Five: The Once and Future International Investment Regime*, ITA Academic Council, Malibu, January 15-16, 2011, on page 1.

**Australia:**<sup>39</sup> The Australian government decided to review its international trade policy in order to increase its national prosperity and sustainability by ‘the inclusion of reasonable labour and environmental standards in trade agreements’. For this reason, the government decided: (i) to ‘no longer pursue investor-state arbitration provisions in future economic agreements with developing countries’; and (ii) not to negotiate BITs that ‘confer [through investor-state dispute resolution provisions] [greater] legal rights on foreign businesses than those available to domestic businesses’.<sup>40</sup>

Indeed, the current legal and political concerns surrounding the treaty-based investor/state arbitration practice do not exclusively arise from national states. Concerns are also expressed by various multilateral organizations such as the European Parliament, UNCTAD and OPEC. Examples of these concerns at the international level are further described in the following sub-section.

### **c. International concerns regarding the investor-state arbitration system**

International organizations like states have also started to express their points of view, which are similar to the state’s legal and political concerns, regarding the current practice of treaty-based investor/state arbitration and the international investment law implications on the progressive economic development of the world. The following organizations have articulated their concerns under the following premises:

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<sup>39</sup> *Trading our way to more jobs and prosperity* – Department of Foreign Affairs and Trade – Australian Government < <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf> > (Last visit 05/06/2011).

<sup>40</sup> *In policy switch, Australia disavows need for investor-state arbitration provisions in trade and investment agreements* – Investment Arbitration Reporter < <http://www.iareporter.com/articles/20110414> > (Last visit 10/05/2011).

**European Parliament (EP):**<sup>41</sup> On March 22, 2011, the Committee on International Trade of the European Parliament published a report on the future European international investment policy.

This report draws attention to the following matters: (i) the conclusion of more than 1,200 BITs between EU member states and third states; (ii) the inconvenience of relying on a wide definition of ‘direct foreign investment’; (iii) the problems and different interpretations caused by the vague language used in BITs, in particular, leading to the possible conflict between private interests and the regulatory tasks of public authorities; (iv) the political concern about considering the acceptance of legislative acts as a potential violation of the principle of ‘fair and equitable treatment’; (v) the necessity of defining a European investment policy which meets the expectations of both the investors and host states; (vi) the importance of not only protecting investors, but also guaranteeing the protection of the state’s right to exercise its regulatory power through its public authorities in accordance with its policy coherence for development; and (vii) the need to draft a non-mandatory guideline to be used by the member states as a BIT model to enhance certainty and consistency.

The committee also considered it necessary to define in a clear manner the investments to be protected as well as to clearly formulate the definition of each of the minimum standards of treatment, e.g., national treatment, most-favoured-nation treatment, fair and equitable treatment.

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<sup>41</sup> *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN>> (Last visit 28/04/2011).

The Committee further expressed its deep concern over ‘*the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses*, thereby leading to the *ruling out of legitimate public regulations*’. (Emphasis added).

The Committee also suggested the incorporation of a clause into a BIT that impedes EU member states from adjusting their social and environmental legislation in order to attract investment.

Finally, the Committee considered that the current mechanisms to settle disputes (including investment arbitration) *should be deeply reviewed* in order to guarantee a higher level of transparency. It was also stated that this revision should also include the review and/or the amendment of the ICSID Convention and UNCITRAL rules, respectively.

One last point of interest regarding the content of this document is found in the suggestions made by the Committee on Development to the Committee on International Trade. The suggestion is listed at number 4 of the list and states that ‘fairness in investment agreements entails allowing *developing countries to discriminate between different investments on the basis of their contribution to development objectives*’.<sup>42</sup> (Emphasis added).

**United Nations Conference on Trade and Development (UNCTAD):** On May 2010, the UNCTAD published a report entitled ‘Investor-State Disputes:

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<sup>42</sup> See, e.g., suggestion number 4, on page 14 of *Report on the Future European International Investment Policy* dated 22 March 2011 – European Parliament Website <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0/EN>> (Last visit 28/04/2011).



Prevention and Alternatives to Arbitration’.<sup>43</sup> Throughout this report, the UNCTAD highlighted the following concerns regarding investor-state arbitrations: (i) the increase of the already high costs of investor-state arbitration in recent years (including the higher amounts of compensation to be paid by the host state in addition to the high costs of arbitration proceedings); (ii) the ‘significant increase in the average time frame for claims to be settled by a final award and executed subsequently’ (including the dilatory procedural strategies used by the parties such as separating jurisdiction from merits); (iii) the difficulty of managing investor-state disputes and the substantial loss of control over the procedure by the contracting parties of a BIT; (iv) the often hostile relationship between the investor and the state after the conclusion of the arbitral award; (v) the state fears ‘about frivolous and vexatious claims that could inhibit legitimate regulatory action by governments’; (vi) the crisis of legitimacy surrounding the treaty-based investor-state arbitration system (due to the conflicting arbitral awards and to the evaluation of the host state’s regulatory conduct); and (vii) the investor-state arbitration’s heavy emphasis on the payment of compensation as a unique solution to the dispute, whilst other possibilities for a solution between the parties, such as reaching compensatory agreements, are left aside.

Finally, the report concluded that ‘the current international investment law community finds itself at a crossroads concerning the use of appropriate methods to the resolution of international investment disputes’.<sup>44</sup>

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<sup>43</sup> *Investor-State Disputes: Prevention and Alternatives to Arbitration* – UNCTAD Series on International Investment Policies for Development – UNCTAD, New York and Geneva, 2010 <[http://www.unctad.org/en/docs/diaeia200911\\_en.pdf](http://www.unctad.org/en/docs/diaeia200911_en.pdf)> (Last visit 12/04/2011).

<sup>44</sup> For more documents published by the UNCTAD in this regard, the author recommends to visit <<http://www.unctad.org/templates/Page.asp?intItemID=2340&lang=1>>.

**Organization of Petroleum Exporting Countries (OPEC):** As part of the implementation of the new Venezuelan oil policy, the Venezuelan government decided to ‘renationalize’ its oil industry.<sup>45</sup> In achieving its aim, in 2005 the government initiated an amicable process with all international oil companies (IOCs) investing in the Venezuelan territory to renegotiate their petroleum agreements and subsequently transfer them to the new business scheme established within the new Oil Law (2001), i.e., the scheme of mixed companies (joint ventures with a majority participation of the state).

However, during this transferral process, two IOCs did not accept the terms and conditions proposed by the government and therefore the government decided to expropriate their assets that were in the country.

As a consequence of not reaching a mutual agreement on the amount of compensation for their assets within the country, the two IOCs decided to take legal actions against Venezuela through treaty-based investment arbitrations and contractually-based commercial arbitrations, before the ICSID and ICC, respectively.

Before requesting a commercial arbitration, one of the IOCs decided to request more than four *ex parte* preventive measures – in various jurisdictions simultaneously – against the Venezuelan National Oil Company (PDVSA) for a total amount of approximately US\$ 12,000,000,000.00.

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<sup>45</sup> For a detailed discussion of this topic, see H. Rondón de Sanso, El Régimen Jurídico de los Hidrocarburos – El Impacto del Petróleo en Venezuela (First Edition, Epsilon Libros, Venezuela 2008). See also P. D. Cameron, International Energy Investment Law –The Pursuit of Stability (Oxford University Press, UK, 2010).

As a government reaction to the disproportionate legal actions requested by this IOC against Venezuela's interests, the Venezuelan government decided to take its concern to the OPEC Conference.

Consequently, on March 5, 2008, the OPEC Conference published a press release through which Venezuela's concern regarding international arbitration was addressed.<sup>46</sup> The Conference (i) expressed its unanimous support of Venezuela and acknowledged its sovereign right over its natural resources; and (ii) 'called for resolving [investor/state arbitration] through good faith and amicable negotiations'.

This later submission was formulated with an additional suggestion by the conference to partake in investor/state arbitration. The suggestion was limited to highlighting that investor/state arbitration should be solved through the amicable negotiations, but 'excluding ex parte pre-judgement measures *which will make finding fair solutions more difficult*'. (Emphasis added).

To sum up, it can be stated that legal and political concerns regarding the current investor/state arbitration practice have transcended the frontiers of national states and international organizations to invade the sphere of academia. It is true to state that various academics have jointly expressed their views regarding this arbitral matter. This point is explained in the following sub-section which addresses what constitutes the first academic expression on this topic.

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<sup>46</sup> Press Release No 4/2008 – 148<sup>th</sup> Meeting of the OPEC Conference, Vienna – Austria – OPEC Website <[http://www.opec.org/opec\\_web/en/961.htm](http://www.opec.org/opec_web/en/961.htm)> (Last visit 02/10/2010).

#### d. Academic concerns regarding the investor-state arbitration system

On August 31, 2010, an academic concern was jointly expressed through the publication of the article entitled '*Public Statement on the International Investment Regime*'.<sup>47</sup> The concern articulated in this publication on the current international investment system was shared by a significant group of scholars.<sup>48</sup>

A declaration of the concern surrounding this arbitral system was first made by the Osgoode Hall Law School, York University, Toronto, Canada as it drew attention to the 'harm done to the public welfare by the international investment regime' and '[the] hampering of the ability of government to act for their people'. It can be stated that this

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<sup>47</sup> *Public Statement on the International Investment Regime dated August 31, 2010* – Osgoode Hall Law School, York University (Toronto, Canada) – York University Website < [http://www.osgoode.yorku.ca/public\\_statement/](http://www.osgoode.yorku.ca/public_statement/) > (Last visit 26/11/2010).

<sup>48</sup> Gus Van Harten – Associate Professor of Law (Osgoode Hall Law School – York University); David Schneiderman – Professor of Law and Political Sciences (University of Toronto); Muthucumaraswamy Sornarajah – Professor of Law (National University of Singapore); Peter Muchlinski – Professor of Law (University of London (SOAS)); Sol Picciotto – Emeritus Professor of Law (Lancaster University); Craig Scott – Professor of Law (Osgoode Hall Law School – York University); Kyla Tienhaara – Research Fellow in Environmental Governability (Australian National University); Obiora Okafor – Professor of Law (Osgoode Hall Law School – York University); Stepan Wood – Professor of Law (Osgoode Hall Law School – York University); Amanda Perry-Kessaris – Professor of Law (University of London (SOAS)); Kevin Gallagher – Associate Professor of International Relations (Boston University); Margot Salomon – Tenured Professor of Law (London School of Economics); A. Claire Cutler – Professor of International Law and International Relations (University of Victoria); Martin Loughlin – Professor of Public Law (London School of Economics); Barnali Choudhury – Associate Professor of Law (McGill University); Saskia Sassen – Professor of Sociology (Columbia University); Jennifer Clapp – Professor of Environmental Studies (University of Waterloo); Tom Faunce – Associate Professor of Law (Australian National University); Peter Drahos – Professor of Law (Australian National University); Peter Newell – Professor of International Development (University of East Anglia); Sheldon Leader – Professor of Law (University of Essex); Anne Orford – Professor of International Law (University of Melbourne); Julio Faundez – Professor of Law (University of Warwick); Paddy Ireland – Professor of Law (University of Kent); Emma Aisbett – Research Fellow in Economics (Australian National University); Jonathan Klaaren – Professor of Law (University of the Witwatersrand); James Gathii – Professor of International Commercial Law (Albany Law School); Ken Shalden – Associate Professor of Development Studies (London School of Economics); John Braithwaite – Federation Fellow in Regulation Institutions. (Australian National University); Harry Arthurs – Professor of Law (Osgoode Hall Law School); Stephen Clarkson – Professor of Political Sciences (University of Toronto); Ruth Buchanan – Associate Professor of Law (Osgoode Hall Law School); Martti Koskenniemi – Professor of International Law (University of Helsinki); Nico Krisch – Professor of International Law (Hertie School of Governance); Markus Krajewski – Invited Professor of Law (University of Bremen); Penelope Simons – Associate Professor of Law (University of Ottawa); Lawan Thanadsillapakul – Professor of Law (Sukhothai Thammathirat Open University); Graham Mayeda – Associate Professor of Law (University of Ottawa); Cai Congyan – Professor of International Law (Xiamen University); Liu Sun – Professor (Zhongnan University of Economics and Law); Joachim Spangenberg – Research Coordinator (Sustainable Europe Research Institute); Daniel D. Bradlow – Professor of International Development Law and African Economic Relations (University of Pretoria); Xiuli Han – Associate Professor of International Law (Xiamen University); Christian Bellak – Associate Professor of Economics (University of Vienna); Audrey Macklin – Professor of Law (University of Toronto); Eva Paus – Professor of Economics (Mount Holyoke College); Stephen McBride – Professor of Political Science (McMaster University); and Jane Kelsey – Professor of Law (University of Auckland).

document represents the first open academic expression against the current investor/state arbitration practice.<sup>49</sup>

This academic declaration was headed by a list of general principles relating to the international investment regime in general. These principles are summarized as follows: (i) the promotion of public welfare; (ii) the access to an open and independent judicial system for the resolution of disputes; (iii) the governments' responsibility to encourage the beneficial impacts of foreign investments whilst limiting the harmful effects of it; and (iv) the right of the state to regulate on behalf of the public welfare.

Subsequently, the article also identifies some of the current problems with the international investment practice, such as (i) the overly expansive interpretations by international arbitrators of provisions contained in investment treaties, through their arbitral awards; (ii) the overriding interests of foreign investors over the right of the state to regulate on behalf of the public welfare; and (iii) the serious effect that some arbitral awards may have upon democratic choice and the capacity of governments to act in the public interest.

Based on these three main criticisms of the current arbitral practice, it was suggested that: (i) municipal law should be the primary legal framework for the regulation of investor/state relations; (ii) investment treaty arbitration appears not to be a fair, independent and balanced method for the resolution of investment disputes; (iii) the possibility of giving society active participation in the process of taking decisions that affects its rights and interests should be considered; (iv) the idea of opting for the conclusion of investment contracts rather than investment treaties due to the possibility

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<sup>49</sup> It has also been said that '[i]n some cases arbitral tribunals have gone too far one way, with the result that states have begun to step in and cut back on certain rights intended to protect investors'. See A. Sheppard, and M. Hunter, *Introduction: An Overview of the Relationship Between Courts and Investment Treaty Arbitration* in Ortino, Sheppard and Warner, *supra* note 4, on page 165.

of the former to incorporate domestic law into the regulation of its investor/state relationship; (v) the idea of concluding investment contracts in accordance with the principles of public accountability and openness as well as the guarantee of preserving the rights of the state to regulate in good faith and for a legitimate purpose; (vi) the creation of a fair and balanced mechanism in the investment contract that allows the parties to renegotiate the interests at stake; and (vii) the problem of concluding multilateral investment agreements due to their lack of fairness, balance, basic requirements of openness and judicial independence.

The group of scholars conclude by recommending that (i) *states should review* their BITs in order to withdraw from or renegotiate them to replace or reduce the use of investor/state arbitration; (ii) *states should strengthen* their domestic justice system; and (iii) *international organizations and the international business community should refrain* from promoting the international investment regime due to the serious risk that this regime poses to governments' national interests.

Finally, it can be asserted that this public statement draws attention to the increasing concern (from some developing countries such as Venezuela, Bolivia, Ecuador and Argentina) related to the interpretation of investment treaties made largely in favour of investors. It was emphasized that the current investment arbitral practice is significantly prioritizing the protection of investors' properties and economic interests over the right of the state to regulate to protect its national welfare. It is therefore of importance to refer to the theory which suggests that this investment arbitral practice is affecting the balance between investors' interests and public regulation in international law. Consequently, it can be affirmed that this unbalanced relationship between the state and investors seems also to be generating a conflict of interests and subsequently has a

negative effect on the legitimacy of the current international investment arbitration system. This latter concern is the main discussion in the next upcoming sub-section where this last point is developed.

**e. Seeking a balanced relationship between state regulatory power and investment protection**

Under the current international investment arbitration system, it has been established that foreign investors are initially at a legal disadvantage<sup>50</sup> in comparison to the unilateral powers of the host state (e.g., exorbitant powers).<sup>51</sup>

The main argument has been that these unilateral powers not only embrace the state's ability to take legal measures towards the protection and promotion of its domestic economy and development, but these unilateral powers also have an unintentional effect of protecting the *status quo* of foreign investors' interests. For example, it has been said that this effect has created a kind of an ambivalent picture about the roles of the state regarding foreign investment since it wishes to attract investment but, on the other hand, it needs to control and regulate investments.<sup>52</sup>

Furthermore, it has also been argued that this disadvantage has created an unequal legal relationship between investors and states at the international and national levels. In other words, the state has appeared as a powerful party in a BIT relationship rather than as a sovereign state empowered to adopt measures to protect and promote not only national investors' interests, but also those of foreign investors. Therefore, it has been

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<sup>50</sup> It has been stated that 'the whole purpose and *raison d'être* of international investment law is to provide investors with a certain elevated level of protection'. See I. Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 381.

<sup>51</sup> See *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 15, on paragraph 104. See also T. W. Wälde, "Equality of Arms" in *Investment Arbitration: Procedural Challenges in Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, USA, 2010), on page 162.

<sup>52</sup> See Sheppard and Hunter, *supra* note 49, on page 165; and M. Sornarajah, *The International Law of Foreign Investment* (Second Edition, Cambridge University Press, UK 2004), on page 101.

considered that foreign investors are *individuals legally weak* in front of the legal apparatus of the state.<sup>53</sup>

Obviously, this opinion derives from the clash between the interests of the capital-exporting states (e.g., developed countries) and the interests of the capital-importing states (e.g., developing countries) as well as from the adoption of economic measures by each of these global economic players on grounds of protecting their own economic interests.<sup>54</sup> Nonetheless, it has been suggested that studies such as the present research can help to provide a mechanism to establish a framework of predictability and stability between states and investors.<sup>55</sup>

In addition, another concern that has arisen is related to the concept of ‘interest’ or of ‘common interest’ which seems to require more attention within the expanding international investment arbitration system due to the fact that its legal implications are currently vague at the international level and therefore, are ‘very slow to appear’.<sup>56</sup>

Nonetheless, it is important to emphasize that it has been pointed out that a BIT must not be interpreted in favour of or against investors.<sup>57</sup> Conversely, it has been stated that ‘[a] BIT itself [has to be interpreted as] an instrument agreed [by two contracting sovereign states] to encourage and protect investment’.<sup>58</sup> That is to say, the contracting states are in equal positions in relation to each other, whereas the host state and foreign investors are not in equal positions in relation to each other under international or national law (see Chapter III).

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<sup>53</sup> See *Azurix v. Argentina* (2006), supra note 7, paragraphs 311-313. See *Thunderbird v. Mexico* (2006) – Separate Opinion, supra note 15, paragraph 86.

<sup>54</sup> See Sornarajah, supra note 52, on pages 5 and 35; and Sornarajah, supra note 2.

<sup>55</sup> See R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. Int’l L. & Pol. 953 (2006), on page 1.

<sup>56</sup> See P. Reuter, *Introduction to Law of Treaties* (Kegal Paul International, London and New York, 1995), on page 6.

<sup>57</sup> See *Azurix v. Argentina* (2006), supra note 7, paragraph 307.

<sup>58</sup> *Ibid.*



Within this context, it has been asserted that the private investor has been granted the opportunity to be temporarily in an equal position through the possibility of requesting a private right of action against sovereign states at the international level.<sup>59</sup> This action has been qualified as the unilateral action of the foreign investor.<sup>60</sup> This temporary right is created through the consent of the states to incorporate a clause, within a BIT's provisions, to arbitrate public-law matters or regulatory issues arising from a violation of the BIT's provisions, in particular the violation of the FET standard.

Despite the difficulty of assessing the impact of the interaction between the forces of capital-exporting and capital importing states and their different sets of norms relating to investment protection, the encouragement and protection of investments sought by a given BIT implies – without doubt – the interplay of a wide range of economic, political and historical factors which have been shaping the development of international investment law.<sup>61</sup> In simple terms, it has been the inevitable interaction between states and investors that has given rise to the existence of this new system of international investment arbitration.<sup>62</sup> Therefore, this interaction should be considered a two-way relationship rather than a one-way relationship so that both players are part of the growing global solidarity.<sup>63</sup> If this suggestion of considering some domestic administrative law principles when dealing with international regulatory disputes is implemented, the alleged legitimacy crisis<sup>64</sup> of the current international investment

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<sup>59</sup> See A. G. Adaralegbe, Concurrent Jurisdiction Between Treaty and Domestic Tribunals: An Examination of Jurisdiction-Regulating Mechanisms Within the Investor-State Treaty Arbitration System and Their Effectiveness (CEPMLP, University of Dundee, PhD Thesis, 2009), on page 154.

<sup>60</sup> See Sornarajah, *supra* note 52, on page 3.

<sup>61</sup> *Ibid.*, on page 5.

<sup>62</sup> R. Gilpin, The Political Economy of International Relations (1987), 33; quoted by Sornarajah, *supra* note 52, on page 17.

<sup>63</sup> See Reuter, *supra* note 56, on page 3.

<sup>64</sup> See B. Kingsbury, and S. W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality* in S. W. Schill, International Investment Law and Comparative Public Law (Oxford University Press, UK 2010), on page 75.

arbitration system could be mitigated.<sup>65</sup> Moreover, it can be considered to be the best form of stabilisation between the parties involved (e.g., reaching ‘an equitable deal’).<sup>66</sup>

In fact, it has been argued that ‘[a] state seeks to balance [its competing functions of attracting investment and of controlling it] through its investment laws’.<sup>67</sup> One of the manners to reach this balance is through creating ‘a nice balance of international interests in the protection of investment and the interests of the host state in regulating the process having its own benefits on mind.’<sup>68</sup>

As was mentioned in Chapter V, one of the most difficult tasks for any public law lawyer is to determine with clarity the scope of the norms to be applied to international regulatory disputes in order to reach the above-mentioned investor-state balance. Obtaining this balance will subsequently guarantee the coexistence of international and national standards in a way that may be acceptable – in terms of international law – to both states and investors. Hence, the main challenge has been identified as the problem resulting from the application (separately or jointly) of some principles of international and national laws due to the non-static nature of the law that results in constant changes in both laws.<sup>69</sup>

It can be suggested that one of the temporary solutions to this unbalanced investor-state relationship is the consideration of or reference to some principles of domestic (constitutional and administrative) law alongside international law in the current international investment arbitration regime (particularly the FET standard when

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<sup>65</sup> See S. Schill, *International Investment Law and Comparative Public Law – An Introduction*, in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 6.

<sup>66</sup> See G. Kahale III, *The Upoar Surrounding Petroleum Contract Renegotiations*, 82 Oxford Energy Forum (August 2010) – Oxford Institute for Energy Studies, on page 5.

<sup>67</sup> See Sornarajah, *supra* note 52, on page 101; and W. Burke-White, and A. Von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 695.

<sup>68</sup> See Sornarajah, *supra* note 52, on page 18.

<sup>69</sup> See *Waste v. Mexico* (2004), *supra* note 16, on paragraph 92.

international regulatory disputes are at stake). This practice can be framed within the proposal formulated by W. Burke-White and A. Von Staden of considering ‘public law standards of review [into] investor-state arbitrations’ as ‘a margin of appreciation’.<sup>70</sup> Similarly, this practice could conceivably help investment arbitrators in their difficult tasks of assessing the regulatory conduct of a state at the international level. In particular, the fact that unilateral powers of states have not been codified at the international level has yet to be taken into account.<sup>71</sup> Furthermore, it can be stated that the fact that administrative law rights have been currently included within the definition of foreign investment demonstrates the growing importance of administrative law within the expanding international investment arbitration system as an international mechanism to protect the subjective rights of the private individuals involved.

This observation demonstrates the importance of international arbitrators to consider domestic law principles when carrying out the difficult task of assessing the regulatory control of a state over foreign investments. However, this practice implies the arbitral exercise of considering the regulatory conduct of the state in accordance with standards and principles that have not been fully developed yet. Nevertheless, this exercise at least provides a worldwide feeling that the rights and legal traditions of the states are being considered which can consequently serve to strike a fair balance between states and investors. Achieving this fair balance can also help alleviate the criticism concerning the legitimacy of the international investment arbitration system.

In summary, it has been asserted that IITs ‘are an agreed set of rules that serve to attract foreign investment by reducing the space for unprincipled and arbitrary actions of the host state and thus contributing to good governance, which is a necessary condition for

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<sup>70</sup> See Burke-White and Von Staden, *supra* note 67, on page 720.

<sup>71</sup> Mobil Corporation *et al* v. Bolivarian Republic of Venezuela (ICSID Case ARB/07/27) June 10, 2010 – Decision on Jurisdiction.

the achievement of economic progress in the host state.’<sup>72</sup> Based on this idea, along with the lack of a set of guidelines to address the unilateral power of the state at the international level and the unbalanced relationship between states and investors interests,<sup>73</sup> the following sub-section generally summarizes the main aim of this research.

#### **f. Principles of Administrative law**

It has been acknowledged by the UNCTAD that ‘international arbitration, alongside the resort to national courts of the host State, *has been the most commonly used method for the settlement of international investment disputes*’.<sup>74</sup> (Emphasis added). This statement is supported by the fact that investor-state treaty arbitration cases amounted to 390 cases by the end of 2010 which involved 83 different governments from both developed and developing countries.<sup>75</sup>

This number of cases serves to reflect the indubitable importance of investor-state treaty arbitration within the (national and international) public law sphere due to the considerable evaluation and assessment of the domestic regulatory conduct of a host state to settle a certain international legal dispute transparently. This is particularly so when it has been emphasized that domestic law principles must be examined to determine whether a host state’s conduct has respected the obligations imposed by an IIT in particular in accordance with the provision containing the FET standard.<sup>76</sup>

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<sup>72</sup> See Dolzer, *supra* note 55.

<sup>73</sup> *Ibid.*, on page 972.

<sup>74</sup> *Investor-State Disputes: Prevention and Alternatives to Arbitration* – UNCTAD Series on International Investment Policies for Development – UNCTAD, New York and Geneva, 2010, on page 1. <[http://www.unctad.org/en/docs/diaeia200911\\_en.pdf](http://www.unctad.org/en/docs/diaeia200911_en.pdf)> (Last visit 12/04/2011).

<sup>75</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note, No. 1, March 2011 <[http://www.unctad.org/en/docs/webdiaeia20113\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20113_en.pdf)> (Last visit 25/06/2011).

<sup>76</sup> See Dolzer, *supra* note 55, on page 955.

A further issue of importance which ought to be emphasized is the increasing tendency of incorporating administrative law rights within the definition of foreign investment. It has been stated that this inclusion ‘greatly restricts the right of the state to exercise regulatory control over the foreign investment.’<sup>77</sup>

The frequent use of these arbitral tribunals, along with the sovereign will of the contracting states to incorporate administrative law rights within the definition of investment in a certain BIT (to resolve any regulatory controversy between one of the contracting states and a national of the other contracting states), demonstrates the awareness on the part of these contracting states in creating a kind of temporary ‘supranational tribunal’ to deal with matters of public law and policy and regulatory issues.

It is true that the traditional concern in the public law and policy arena is that the practice of applying and interpreting the provisions of domestic administrative law, as already mentioned before, was an exclusive task of national courts and jurisdictions. Nonetheless, the concurrent jurisdiction<sup>78</sup> which exists between these two legal mechanisms to deal with regulatory disputes demonstrates and confirms the importance of dealing with public law matters at two different (parallel) levels (e.g., national and international).

These two different (parallel) levels of resolving public-law disputes (particularly regulatory disputes) require the consideration of traditional sources of law including municipal and international laws. This need is more pressing due to the fact that under both of the most important administrative law systems (e.g., British and French) there

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<sup>77</sup> See Sornarajah, *supra* note 52, on page 15.

<sup>78</sup> For an extended study on the current jurisdiction between national courts and investment tribunals, the author recommends: Adaralegbe, *supra* note 59.

are analogous mechanisms to resolve private individual claims against their public administrations which have existed for more than seventy five years (see Chapter II). Particular consideration should be given to the French system, as there is a special jurisdiction which is known as administrative-contentious jurisdiction. This distinct jurisdiction was created with the objective of providing private individuals with a special forum to challenge the rights and prerogatives of their public administrations.

Additionally, it is significant to emphasize, that under these analogous mechanisms, there is an established set of principles of (administrative) law which have been developed for over seventy five years. These principles have also been a frequent point of reference for domestic jurists to resolve this kind of regulatory individual-state controversy. This latter submission acquires more importance in the investment world if the way in which arbitral tribunals interpret and apply domestic law principles when considering the FET standard is taken into consideration.

One of the problematic issues with the current investment arbitral practice and these two parallel levels of judging regulatory issues is the very restricted manner (known as the strict ‘no other means available’ approach<sup>79</sup>) in which the different sources of law (jointly or separately) are considered, when these sources should be considered to be all-in-one source of wisdom for any jurist. More precisely, it is true that there is a restricted approach in the consideration of these different sources of law, but it is also true that neither national nor international laws prohibit any administrator of justice from resorting jointly to those municipal or international mechanisms or sources of law which can expedite the administration of justice when dealing with regulatory disputes.

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<sup>79</sup> See Burke-White and Von Staden, *supra* note 67, on page 695.

Thus, the present research proposes that international arbitrators particularly when dealing with regulatory disputes should resort or make reference to one of the sources of law, such as the principles of domestic (administrative) law, in a manner which imparts justice in a fair, transparent and equitable manner. The main objective of this proposal can be found in the following sub-section which basically summarizes the issues raised throughout this thesis.

i. Principles of domestic administrative law as a source of reference for investment arbitrators

Many BITs such as the USA-Argentina BIT<sup>80</sup> and the USA-Panama BIT include within their definition of ‘investment’<sup>81</sup> *administrative law rights* such as licences and permits. As already stressed, this inclusion implies the necessity of resorting to administrative law principles when resolving a BIT regulatory dispute. This is due to the fact that this inclusion seems to restrict the exercise of the sovereign power of the host state over foreign investment. Similarly, another group of BITs have included the term ‘administrative acts’ in the clause related to the arbitration mechanism. An example of this is found in article 10 (1) of the Colombia-Spain BIT.<sup>82</sup>

Furthermore, another group of BITs, such as the Colombia-Switzerland BIT and the USA-Ecuador BIT, have made a direct reference to *national administrative courts* to settle a treaty dispute, particularly in those cases where the contracting states have provided the investor with the option of either resorting to a domestic administrative court or resorting to an IIT’s arbitration in the case of a BIT dispute.

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<sup>80</sup> This treaty includes within the definition of investment, ‘any right conferred by law or contract, and any licenses and permits pursuant to law...’.

<sup>81</sup> An example of this definition is worded as follows ‘any right conferred by law or contract, and any licenses and permits pursuant to law...’.

<sup>82</sup> Article 10 (1) of the Colombia-Spain BIT states ‘for submitting a claim with regard to administrative acts to a domestic forum or to arbitration provided under this Section, *it will be indispensable first to exhaust the governmental procedures which have been provided for.*’ (Emphasis added). (Translated into English by the Author.)

Additionally, it has been said that ‘[m]any treaties conserve the regulatory regimes of the host state by confining the scope of the treaty... to investments “*made in accordance with the laws, policies and regulations*” of the host state.’<sup>83</sup> (Emphasis added). Examples of such a limitation are found in article 1; of the Bulgaria-China BIT; of the China-Bahrain BIT; and the Venezuela-Vietnam BIT. These types of articles serve to emphasize that the foreign investment has to follow the required domestic legal steps before it can be recognised as a protected foreign investment under a certain BIT’s provisions.

Moreover, the majority of BITs refer to the ICSID Convention in order to determine the law applicable to an investor-state investment dispute. In this context, article 42 of the Convention states that:

*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.* (Emphasis added).

Thus, it is primarily up to the parties to determine the applicable law to the dispute by agreement. The Convention here does not classify or discriminate the sources of law. Conversely, this task is left to the discretion of international arbitrators as was mentioned in Chapter IV. However, as already mentioned, recent practice serves to illustrate that arbitral tribunals have taken account of the increasing necessity of relying on, or referring to, domestic law principles as a source of legal reference or a legal guideline to resolve regulatory issues.<sup>84</sup>

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<sup>83</sup> Sornarajah, *supra* note 52, on page 266.

<sup>84</sup> See, e.g., *Mobil v. Venezuela* (2010), *supra* note 71, paragraph 81. See *Azurix v. Argentina* (2006), *supra* note 7, paragraph 67. See also *Occidental Exploration and Production Company v. The Republic of Ecuador* (London Court of International Arbitration Administered Case No. UN 3467) July 1, 2004 – Final Award,



Thus, as highlighted in Chapter IV, the question arises as to whether these legal principles can be a useful reference for investment arbitrators when dealing with a treaty-based regulatory dispute. Especially, if this practice is considered to be a mechanism which may help to minimize the risk of nullity of the resulting award<sup>85</sup> as well as a way of increasing the legitimacy of the investment arbitration system.<sup>86</sup> It has been asserted that ‘the need for public law standards of review is... urgent, as arbitral tribunals are transformed into public law, quasi-constitutional adjudicators’.<sup>87</sup>

Furthermore, it is important to take into account that some investment treatment standards have also been considered as relative standards *par excellence*.<sup>88</sup> Examples of these standards are fair and equitable treatment, national treatment and most-favoured-nation treatment.

A response to the question concerning the usefulness of referring to these domestic law principles in regulatory disputes can be found in the proposal formulated by Professor T. Wälde in his separate opinion in *International Thunderbird Gaming Corporation v The United Mexican States* (UNCITRAL Arbitration Rules, 2005). It was stated that ‘[t]he common principles of the principal administrative law systems are... *an important point of reference for the interpretation of investment treaties* to the extent [that] investment treaty jurisprudence is not yet firmly established.’<sup>89</sup> (Emphasis added).

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paragraphs 58 and 137; and *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award, paragraphs 69.

<sup>85</sup> See C. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention – A Commentary* (Second Edition, Cambridge University Press, UK, 2010), on page 554.

<sup>86</sup> See Sornarajah, *supra* note 52, on page 343.

<sup>87</sup> See Burke-White and Von Staden, *supra* note 67, on page 694.

<sup>88</sup> See Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, *supra* note 28, on page 47.

<sup>89</sup> Paragraph 28.

Similarly, a more conservative answer to the same question can be inferred from certain statements which have been made in the academic arena. In this regard, it was expressed through the *Public Statement on the International Investment Regime* that ‘municipal law should be the primary legal framework for the regulation of investor/state relations’.<sup>90</sup> (Emphasis added).

Furthermore, as Professor M. Sornarajah stated, the viability of this proposal will largely depend on the establishment or, perhaps, acknowledgment of ‘common standards of procedural protection against the use of discretionary power of administrative bodies [which] may be discernible in trade and investment areas’.<sup>91</sup>

Finally, it has been stated that ‘[an] arbitral tribunal may indeed have little choice but to adopt approaches that are similar to those adopted by domestic courts and other international courts and tribunals when faced with comparable [regulatory] conflicts between important interests that must all be weighed in the legal appraisal’.<sup>92</sup>

- ii. The use of domestic administrative law principles as a way to reinforce the legitimacy of the investor-state arbitration system

During the last five years, legal and political criticisms have not only been expressed against the investor-state arbitration system but also against the host state’s power to regulate foreign investors/investments.

These criticisms do not only come from various states, but also emanate from international organizations and academia, as discussed earlier in this chapter. These criticisms are affecting, in a way or another, the legitimacy of this emerging system.

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<sup>90</sup> *Public Statement on the International Investment Regime dated August 31, 2010* – Osgoode Hall Law School, York University (Toronto, Canada) – York University Website < [http://www.osgoode.yorku.ca/public\\_statement/](http://www.osgoode.yorku.ca/public_statement/) > (Last visit 26/11/2010).

<sup>91</sup> See Sornarajah, *supra* note 52, on page 104.

<sup>92</sup> See Kingsbury and Schill, *supra* note 64, on page 78.

These criticisms include the disapproval about ‘the lack of democratic control and accountability’ of this system.<sup>93</sup> It is of importance to highlight that evidence of this legitimacy crisis is found in the constant conflict of interests between private individuals and the regulatory power of the state.<sup>94</sup> At the international level, this conflict derives from the diverse natures of some of the investment treatment standards such as the FET standard, which play an important role within the area of public law and are considered relative standards *per excellence*.<sup>95</sup>

It could be said that this conflict between private individuals and the regulatory power of the state has created theory which suggests that ‘the adoption of legitimate legislation [could lead to] a state being condemned by international arbitrators for a breach of the principle of “fair and equitable treatment”’.<sup>96</sup> On the contrary, the adoption of such legislation/law as well as of some regulatory measures should instead be considered as acts made for the protection of the national welfare by the state. Within this context, the necessity of relying on a new legal investment law framework that can be used as mechanism to enhance certainty and coherence has been stressed.<sup>97</sup>

Further evidence of this legitimacy crisis is found in the recent withdrawal of some Latin American countries from the ICSID Convention.<sup>98</sup> In addition, a more serious example can be found in the current tendency of both developing countries and

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<sup>93</sup> See S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 7; and G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, Oxford University Press, UK 2007).

<sup>94</sup> *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN>> (Last visit 28/04/2011). See also Kingsbury and Schill, *supra* note 64, on page 75.

<sup>95</sup> See Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, *supra* note 28, on page 47.

<sup>96</sup> *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website, *supra* note 94.

<sup>97</sup> *Ibid.*

<sup>98</sup> See Schill, *supra* note 93, on page 6.

developed countries to review, renegotiate or terminate their BITs (as was explained sub-section (b) of this chapter).

Moreover, it is opportune to emphasize that one of the main concerns of host states regarding the current international investment system is the aspect related to the inclusion of a wider variety of disciplines into BITs which are also critical to their development. It has been argued that this inclusion is becoming increasingly complex.<sup>99</sup> In particular, this relates to the greater legal rights that are granted to foreign investors as compared to those rights given to domestic investors at the international level.<sup>100</sup>

Nevertheless, the principal concern of host states is the preservation of '[o]ne of the most fundamental elements of state sovereignty [which] is both the right and the duty of governments to regulate economic activities and act in the broader public interest'.<sup>101</sup> This preservation is largely guaranteed by referring to those principles of law that have given rise to the particular administrative acts, i.e., by referring to the principle of domestic administrative law. Moreover, there is an additional element to this type of government action which is to ensure that national legitimate interests are not compromised.

Consequently, it can be said that the performance of this administrative conduct will always be protected by the law of any democratic society and will be reinforced by the application of a consolidated and homogenous set of legal principles such as the principles of administrative law.

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<sup>99</sup> See Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, *supra* note 28, on page 47.

<sup>100</sup> *Trading our way to more jobs and prosperity* – Department of Foreign Affairs and Trade – Australian Government <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>> (Last visit 05/06/2011).

<sup>101</sup> See Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, *supra* note 28, on page 47.

Conclusively, it is important to emphasize within the context of this research, the statement made by W. Burke-White and A. Von Staden in the article entitled ‘The need for public law standards of review in investor-state arbitrations’ which states that ‘any move by ICSID tribunals towards a consistent and coherent standard of review appropriate for the context of public law disputes... would increase the investor-state arbitration system’s overall legitimacy’.<sup>102</sup>

### **g. Summary**

The investor-state treaty arbitration system has given rise to various political, legal and academic concerns. The criticisms made about the system increase every year, particularly on issues arising from regulatory disputes in investment arbitration. For this reason, it can be asserted that one of the chief reasons for these various concerns and criticisms is the assessment of a host state’s regulatory conduct and also the review of certain public-law matters by investment arbitrators at the international level.

Additionally, with regard to the current practice of this arbitral system, another concerning issue from a legal point, which has been stressed repeatedly, is the existence of compromising and apparent international restrictions on the sovereign power of state to regulate, as it may violate some standards of international investment law such as fair and equitable treatment. Consequently, some states, in response to this apparent restriction on their sovereign power, have taken governmental and political actions that are affecting the legitimacy of this arbitral system. These actions range from the revision of the terms and conditions of BITs, to the consideration of denouncing or terminating these international agreements. For example, countries like Ecuador; Venezuela; Bolivia; South Africa; and Australia have already taken governmental

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<sup>102</sup> See Burke-White and Von Staden, *supra* note 67, on page 719.

measures which could be seen as putting the legitimacy of this investment arbitration system at risk. Similarly, international organizations such as the European Parliament, UNCTAD and OPEC, in addition to a group of academics, have also expressed their concerns about this system.

Despite the concerns and questions surrounding this system, there is a common intention, within the international arena, to find the right equilibrium between the interest of foreign investors and the regulatory power of the host state.

A temporary solution to this current crisis of legitimacy is the consolidation of these two groups of interests by allowing reference to be made to some principles of domestic (constitutional and administrative) law in the current international investment arbitration practice through the application of the FET standard when international regulatory disputes are being resolved. It can be affirmed that this exercise can bring a certain level of transparency and fairness into the currently criticized dispute resolution mechanism.

Adopting this solution becomes more important if it is taken into consideration that investment arbitration, apart from national courts, has been the most common mechanism used to resolve regulatory disputes between private individuals and states. The proposed solution of referring to administrative law principles is one of the most prompt cures to the argued lack of legitimacy surrounding the investment arbitration system. This practice requires investment arbitrators to rely more on their administrative law knowledge.

## **CHAPTER VII**

### **FINDINGS AND CONCLUSIONS**

#### **a. Summary of the Problem**

The problem addressed throughout this research can be summarized as the constant and growing use of the investor-state treaty arbitration (ISTA) as a mechanism to judge regulatory issues of the host state at the international level without referring sufficiently to its domestic (administrative) law principles. This arbitral exercise raises the question of which principles of law are being applied or referred to by investment arbitrators when they face this kind of regulatory dispute. This question is of crucial importance as the regulatory conduct of the host state is, for the most part, carried out in accordance with its domestic principles of law. Consequently, it means that the host state has a dual role in the public law arena, i.e., as a subject of public (domestic) law when it adopts new policy and regulation, and as a subject of public (international) law when it either acts at the international level by concluding a treaty or breaches an international obligation as a consequence of the domestic regulatory behaviour it adopted as a public (domestic) law subject.

The current arbitral practice has demonstrated that investment arbitrators have been faced with the dual public law role of a state. The particular problem with this duality has been the disappointing application of some domestic (administrative) law principles to international regulatory disputes at the international level which are implicit or connected to the domestic regulatory performance of the host state.

This arbitral approach has caught the political attention of some host states (particularly, from developing countries) due to the constant limitation placed on their sovereign power to adopt new policy and regulation for considering it to be a potential violation of BITs provisions. This attention has also been a result of the arbitral interpretation given to their governmental acts in accordance with international investment obligations, in particular with the fair and equitable standard of treatment.

This practice of referring to international investment standards is creating a conflict between the scope of international investment obligations and the scope of some principles of domestic (administrative) law such as the principle of legality; the principle of discretionary power of public administration; and the principle of legal certainty and legitimate expectations. This conflict relating to the scope of these principles, in addition to the dual role that the state, is affecting the current legal status and legitimacy of the investor-state treaty arbitration system.

It is due to this legitimacy problem that this research has proposed that reference be made to some administrative law principles which have existed within the two most important administrative legal systems of the Western world to deal with domestic regulatory disputes (i.e., the British administrative legal system as a representative of the common law tradition and the French administrative legal system as a representative of the civil law tradition). These administrative law principles have existed for over seventy-five years as 'legal references' to help public law adjudicators in their sensitive task of dealing with regulatory disputes.

Thus, account should be taken of the years of experience that these administrative legal systems have gained from their domestic jurisdictions through countless long legal proceedings which have consequently served to develop the jurisprudence related to



regulatory disputes between private individuals and the state (public administration) at a national level.

The proposed practice of referring to domestic administrative law principles in international regulatory disputes also becomes relevant if the analogous nature between ISTA and domestic administrative law institutions is taken into consideration, as well as the way in which international investment law and domestic administrative law are constructed, i.e., both are constructed on a case law basis.

Finally, it can be asserted that this proposal can act as a temporary solution to the legitimacy crisis that the current international investment arbitration system is facing. Taking these domestic administrative law principles into consideration could possibly even result in achieving a fair and balanced relationship between the host state's regulatory power and international investment protection.

### **b. Main findings**

Throughout this research, the following findings have been highlighted:

- In the British and French domestic administrative legal systems, there are mechanisms in place to solve regulatory disputes between private individuals and the state (i.e., public administration). For example, with regard to administrative review (internal review), there are British Administrative tribunals and French Administrative arbitrations; and in relation to judicial review (external review), the ordinary jurisdiction in the British system is used and the administrative-contentious jurisdiction in the French system is used.

Amongst these mechanisms, it can be stated that the treaty-based regulatory disputes are analogous to the role of administrative review. One of the similarities between treaty-based regulatory dispute and administrative review is the lack of self-enforcing power surrounding decisions. In particular, this international mechanism is even more similar to the functions and responsibilities of the British administrative tribunals and/or of the French administrative arbitration. This is partly due to the fact that both the British and French institutions exercise quasi-judicial functions, as does the ISTA. In other words, all three institutions hear and deal largely with regulatory disputes on a court-like basis.

The existence of British administrative tribunals, French administrative arbitration and ISTA depend upon the promulgation of a given public law instrument. In the case of the British administrative tribunals and French administrative arbitration, an act of parliament is required before such mechanisms can be used. Similarly, in the case of ISTA, an act of state, i.e., a BIT is required before it can be enforced and in some cases, an additional act of parliament is also required (i.e., the Assembly or Congress's approval). This latter requirement will depend on whether the contracting states have adopted a monist or dualist system.

One of the main differences between these local mechanisms and the investor-state treaty arbitration mechanism is that the latter is not part of the executive power of any country. It is important to mention that even though the arbitration mechanism is not part of any country's executive power, it can be considered – without a doubt – to be a part of the state apparatus to administer justice, i.e., a

part of the state's administrative justice system. Hence, it can therefore be said that these mechanisms have the same main objective, which is to protect private individuals against unlawful or arbitrary acts of the government.

On the other hand, the ISTA system is a kind of primary jurisdiction that requires a secondary jurisdiction in order to give the chance to parties to appeal the arbitral decision if they consider that their rights have not been fully guaranteed by the primary arbitral tribunal. That is to say, this latter point indicates the need of creating an international appellate body or a *De Novo* review mechanism that guarantees the right of defence of the parties involved. The creation of these second level mechanisms can bring more transparency and fairness to the current arbitral practice and reinforce the legitimacy of the investment arbitration system. Perhaps this can be one of reasons why it has been pointed out that there is a need to create an investment appellate body or an investment international court.

Arbitral tribunal awards lack self-enforcing power due to the fact that the monopoly of coercive power is reserved for the state. This latter feature is also similar to the lack of self-enforcement that public administration has when an administrative tribunal or administrative arbitration decision needs to be enforced. In this situation, both institutions have to go before a local judge in order to make their decisions enforceable.

- Due to the lack of a centralized legislative authority at the international level, BITs are concluded by sovereign states through their express consent which subsequently leads to a restriction on their immunity from jurisdiction. BITs are contracts of public interest. Like those local acts of parliament that create the

above-mentioned domestic administrative and judicial review mechanisms, BITs similarly serve as a state's act or instrument to create mechanisms, in accordance with the intention of both contracting parties, to solve any legal dispute that may arise from the violation of a BIT's provisions.

Within these provisions, the creation of an international right in favour of private individuals to sue sovereign states at the international level is found. This mechanism is known as 'investor-state treaty arbitration'. This particular mechanism is mainly created with the idea of protecting private individuals (particularly foreign investors) from the possible unlawful or arbitrary acts of the host state, as well as to guarantee that the host state does not exceed certain limits of law or put others in danger.

Nonetheless, despite the fact BITs are contractual agreements (in terms of state/state relationship) that are governed by the private law principles of party autonomy and *pacta sunt servanda* (agreements must be kept); BITs are interpreted in accordance with a public law instrument such as the Vienna Convention. For this reason, it can be inferred that a BIT protection is granted to private individuals as a legal benefit rather than a contractual one. This latter point is emphasized due to the fact that BITs, as any public law agreements, are also subject to the socio-economic-political changes of both contracting parties. The state's ability to make changes to the BIT in the interest of their national welfare is protected by the international principle of *rebus sic stantibus* (things thus standing). Thus, it can be said that this international principle also embraces the sovereign ability of the state to adopt new policy and regulation. In fact, the main aim of BITs is to materialize the reciprocal intentions of the

contracting states in order to promote the economic cooperation for their reciprocal benefit. It can be said that the promotion of their economic cooperation is to their reciprocal benefit, i.e., the involvement of issues of public interest of the contracting states (as part of the BITs' subject-matter). Additionally, the main purpose of BITs is also to address specific needs between contracting states (mainly, issues of public interest).

It is due to these various reasons that BITs mostly provide a regulatory relationship between one contracting state (the host state) and the national of the other contracting state. This regulatory relationship also provides protection to foreign investors and their investments against the unlawful or arbitrary conduct of the host state. Nonetheless, this particular protection is more of a regulatory protection (in terms of investor/state relationship) than a contractual protection which is proper for and derived from the state-state BIT relationship. Hence, BIT protection is not a contractual protection for foreign investors; on the contrary, it is a legal/regulatory protection for foreign investors, that has to exist alongside the rest of norms that are part of host state legislation. Therefore, foreign investor protection embraces the regulatory submission of foreign investors to the BIT's provisions and to international law provisions which may also allow the application of some principles of domestic administrative law when the FET standard needs to be taken into consideration in a regulatory dispute. This premise acquires a special connotation when a BIT has been adopted and incorporated into the legal system of host state (dualism theory).

This regulatory feature of BITs and their provisions do not relinquish the prerogative powers of the host state. On the contrary, the host state maintains its

freedom to adopt new policy and regulations in accordance with the substantive principles of international investment law which aim to minimize the discretionary power of contracting states at the moment of adopting these new policies and regulations. Evidence of this tendency can be found in the 2012 U.S. Model Bilateral Investment Treaty; in the Asean Comprehensive Investment Agreement (ACIA) (2012); in the Trans-Pacific Partnership (TPP) Draft Investment Chapter (June 2012) and in the Draft Model Norwegian Bilateral Investment Treaty (2007) where regulatory areas belonging to the state, such as, health; labour; safety; environment; public morals; public order; protection of human, animal or plant life; taxes; protection of national treasures of artistic, historic and archaeological value; conservation of exhaustible natural resources and financial services; are excluded from the scope of application of the above-mentioned documents.

Similarly, it should be said that these substantive administrative law principles have been conceived to also minimize the investment arbitrator's discretion in assessing the regulatory conduct of any infringing state. This point creates a conflict between the dual public-law role of the state within the national and international law sphere. In other words, it creates a conflict between the scope of national law principles and the scope of international investment law principles when dealing with regulatory disputes. However, the detailed analysis of this particular point is beyond the scope of this research.

- Investor-state treaty arbitration is a new concept in public international law. This mechanism is a mechanism of quasi-judicial effect that has largely been used to resolve regulatory issues derived from the interpretation and application

of a certain BIT and review of the regulatory conduct of the host state at the international level. This mechanism is not a private-law-contract based investor-state arbitration. On the contrary, it is a public-law-contract based investor-state arbitration in relation to which the foreign investor is also subject to its legal effects in general. It can be given a public law nature due to the public law nature of one the parties, who acts in its public law capacity (i.e., the host state), to the public-law nature of the BIT itself which establishes this arbitral mechanism: and, to the public law nature of the subject-matter relating to the dispute, e.g., the evaluation of the regulatory conduct of the state or of issues of public policy.

The fact that the investor-state treaty arbitration clause is created in favour of and at the option of the national of the other contracting party does not mean that the foreign investor is automatically part of the state-state international contractual agreement. Nonetheless, it is true that when contracting states conclude BITs, they are also creating an option for the foreign investor to choose the jurisdiction of a national court or the jurisdiction of an international arbitration (this option is known as the ‘fork-in-the-road’ clause). In this respect, the issue here is the aspect related to the intention of the contracting parties in creating this alternative choice. They should be aware that by creating this option they are submitting their public-law matters and regulatory issues to any of these jurisdictions.

In the USA-Argentina BIT, the contracting parties expressly clarify which local courts will be in charge of solving the BIT’s dispute, i.e., they mention the administrative tribunals of the contracting parties. This clarification is evidence

of the awareness of the parties that they are submitting their regulatory disputes to any of the above-mentioned jurisdictions. A similar example is found in the case of the Colombia-Switzerland BIT where the contracting parties make an express reference to their administrative courts. Both of these examples demonstrate the intention of the contracting parties of placing administrative tribunals/courts and investor-state arbitration at the same level and granting the same subject-matter jurisdiction.

Overall, it can be said that the investor-state arbitration practice represents a limitation to the contracting parties' sovereign immunity of jurisdiction. Indeed, the contracting parties are conscious of fact that they are creating a temporary international forum to resolve regulatory disputes. The controversial issue is to what extent these international tribunals can deal extensively with matters of *Acta Jure Imperii*. It seems that the primary intention of the contracting parties is to give jurisdiction to these arbitral tribunals to deal with matters related to *Acta Jure Gestionis* (i.e., acts by right of management of the state/private-commercial acts).

The contracting states, by the inclusion of alternative choices, also seem to be expressing their will of incorporating their sets of domestic law principles into the investor-state treaty-based regulatory disputes due to the simple fact that these principles are the classic rules that govern the state's domestic regulatory behaviour. It is for this reason that the consent of the state to arbitrate plays an import role in activating the system as a mechanism to adjudicate regulatory matters. An example of this intention can be found in the Colombia-Spain BIT



where the contracting parties expressly incorporated their consent to review administrative acts by investment arbitration.

The investor-state treaty arbitration mechanism, as a type of public law adjudication, has not only been used as an instrument to oppose or resist the regulatory power of the host state, but also as an instrument to review the socio-economic stability of the host state as well as to review the adoption of any governmental decision to expropriate. Additionally, this mechanism has also been used as an instrument to avoid the renegotiation of long-term contracts.

Owing to these factual reasons and also due to the analogy that exists between international regulatory disputes and some domestic mechanisms which are responsible for the review of the regulatory conduct of the state, principles of domestic law are a constructive exercise for the future of this international arbitration system. Unless otherwise agreed to by the contracting parties of a BIT, nothing (BITs, ICSID, and UNCITRAL) impedes or prevents investment arbitrators from referring to some principles of administrative law as part of the law in general when they are attempting to resolve regulatory disputes and when they are applying the FET standard. Obviously, it will largely depend on the discretionary power of the investment arbitrators; however recent practice (particularly since 2000) has shown that domestic law principles have been increasingly referred to in an attempt to resolve regulatory disputes. The exercise of referring to administrative law principles can also be based on the case law nature which is a common feature of both domestic administrative law and international investment law. This common feature becomes significantly more important due to the fact that ISTAs, as a regulatory adjudication

mechanism, also needs to apply, to some extent, questions of administrative policy (i.e., those points that do not contravene the public interest and public welfare) to the controversy. An example of this particular situation can be found in *Pantechniki v Albania* (2009) where the sole arbitrator expressed his opinion about his role as a public law adjudicator.

- In the current arbitral practice, the regulatory conduct of the state has been considered and judged in various manners and from different approaches through multiple arbitral awards. That is to say, this practice has given rise to different interpretations about the regulatory conduct of the state and the standards established in a BIT (particularly in accordance with the FET standard). Hence, it is assumed that this arbitral criterion is not homogeneous. Nonetheless, it is noteworthy to mention here that this lack of homogeneity is not only a typical characteristic of investment arbitral practice; it is also typical of the local administrative law practice due to uncoded nature of both branches of law. The difference between these two branches of public law is that under domestic law, this lack of homogeneity has been more consolidated thanks to more than of seventy-five years of experience within the major administrative legal systems of the Western world.

The responsibility of imparting justice has been granted by sovereign states to local judges and international arbitrators as public law adjudicators to mainly review the regulatory conduct of the state. The problem here is that these public law adjudicators have to face the fact that neither domestic administrative law nor international investment law has been consistently codified either at the national level or at the international level. For this reason, these public law

adjudicators have found it increasingly necessary to resort to previous cases (case law precedent) to resolve this kind of regulatory dispute. Many of these case law precedents have been consolidated through the years of applying these legal principles which act as guidance in assessing the unilateral power of the state at the national and international level. These public law adjudicators have to confront the two different and disconnected levels (national and international) of case law to judge to the same regulatory conduct of the host state. Consequently, arbitral tribunals have recently started resorting to domestic law principles in an increasing, but also conservative, manner as legal sources to provide legal guidance in international regulatory disputes.

As was mentioned before, this arbitral practice seems to be creating a conflict between the scope of some principles of administrative law and the scope of some principles of international investment law. The principles of international investment law are a slightly different version of some principles of domestic (administrative) law but this time at the international level. In fact, this assumption is more credible due to the fact that BITs only enunciate the principles of international investment law and do not extensively explain their respective scopes.

These two sets of principles come from the same branch of law, i.e., from public law and are destined to regulate the conduct of the state at the national level and international level, respectively. Perhaps, this is why these principles are conflicting and therefore, cause some concerns in the host states. Once again, the detailed study of this conflict or clash between the principles is beyond the main scope of this research.

Nonetheless, the necessity of defining these standards and reducing the above-mentioned conflict has been left to the discretion of the investment arbitrators and to investment case law. In any case, it must be acknowledged that constitutional and administrative law principles of the host state should not be discarded at all from the arbitral arena since they have given grounds to the infringing regulatory conduct of the state which is being judged at the international level. Therefore, it is only by accepting this latter premise that the regulatory conduct of a state can be judged by international arbitrators in accordance with the standards agreed to by the contracting parties to a BIT.

For example, under the current arbitral practice, some arbitral tribunals have made references (directly and indirectly) to some principles of domestic administrative law when dealing with the regulatory conduct of the host state, mainly in accordance with principles of international investment law. This practice has been carried out, in some cases, in accordance or in *conflict* with some principles of international investment law such as the FET standard and the National Treatment and Full Protection and Security standards. The following references have been made:

- **Principle of Legality:** *Mobil v. Venezuela (2010)*, reference was made to Venezuelan legislation in order to determine the state's consent to arbitrate and to its right to adopt regulatory measures; *Waste v. Mexico (2004)*, the assessment of the regulatory conduct of some governmental entities was carried out in accordance with the fair and equitable standard and full protection and security as established by the NAFTA without referring to domestic law; *Metalclad v. Mexico (2000)*,

reference was made to Mexican legislation and to the fair and equitable standard in evaluating the regulatory conduct of Mexico; *Thunderbird v. Mexico* (2006), the national conduct was considered as a ‘fact’; *Thunderbird v. Mexico (Separate Opinion, 2006)*, an assessment was carried on a number of local acts of state as they were in violation of legitimate expectations according to NAFTA provisions; *Corn v. Mexico* (2008), an evaluation of the sovereign fiscal conduct of the state was carried out in accordance with NAFTA provisions; *Perenco v. Ecuador* (2009), ICSID’s power to hamper the constitutional powers of Ecuador was demonstrated; *Azurix v. Argentina* (2006), evaluation of the domestic conduct of Argentina and its entities was undertaken in accordance with international law, specifically, in accordance with expropriation without compensation; fair and equitable treatment; arbitrary measures; and full protection and security; *MTD v. Chile* (2004), international law was applied (fair and equitable treatment) despite the agreement of the parties to apply Chilean law; *Occidental v. Ecuador* (2008), Ecuador’s law to review the unilateral acts of the state was disregarded; *Occidental v. Ecuador* (2004), there was consideration of Ecuador’s tax legislation in accordance with the national treatment, fair and equitable treatment, full protection and security; and minimum standards of treatment; *Aconquija v. Argentina* (2000), the Claimant did not exhaust local remedies; *Desert Line v. Yemen* (2008), the tribunal acted as a *De Novo* review tribunal; *Helnan v. Egypt* (2008) and *Pantechniki v. Albania* (2009), the need of reviewing the legality of the governmental conduct by local courts was emphasized.

- **Principle of the public administration's discretionary power:** *Waste v. Mexico* (2004), consideration was given to the public officials' discretion to give a public speech; *Metalclad v. Mexico* (2000), assessment of the fair and equitable treatment and limitation on the discretionary power of the state was carried out; *Thunderbird v. Mexico* (2006), discretionary power of the state was acknowledged; *Thunderbird v. Mexico (Separate Opinion, 2006)*, it was established that the discretionary power of the state could constitute a violation of legitimate expectations under Article 1105 of the NAFTA; *Corn v. Mexico* (2008), reference was made to the discretionary power of the state to adopt fiscal measures; *Perenco v Ecuador* (2009), there was a limitation on the discretionary power of the state; *Azurix v. Argentina* (2006), there was acknowledgment of the discretionary power of the state; *MTD v. Chile* (2004), there was acknowledgment of the discretionary power of the state to adopt new urban policies; *Occidental v. Ecuador* (2004), there was an evaluation of the discretionary power of the state to modify its tax regime; *Helnan v. Egypt* (2008), reference was made to the discretionary power of the state to downgrade a hotel's (stars) status; *Aguaytia v. Peru* (2008), there was acknowledgment of the constitutional discretionary power of the state to protect foreign investments and adopt new laws; *Piero Foresti v. South Africa* (2010), there was acknowledgment of the discretionary power of the state to manage its mineral rights and ownership; *Pantechniki v. Albania* (2009), there was acknowledgment of the discretionary power of the Albanian Ministry of Finance to veto some payments; and *Lucchetti v. Peru*

(2005), the tribunal ignored the principle of discretionary power of the state.

- **Principle of legal certainty and legitimate expectations:** *Metalclad v. Mexico* (2000), indirect reference was made to this principle in conjunction with the principle of fair and equitable treatment; *Thunderbird v. Mexico* (2006), direct reference was made to this principle alongside the NAFTA provisions, without any reference to any other domestic law principle; *Thunderbird v. Mexico (Separate Opinion, 2006)*, there was an interpretation of this principle in accordance with the fair and equitable standard; *Azurix v. Argentina* (2006), the effect of this principle created by a contractual agreement was considered and its evaluation was carried out in accordance with the standards of expropriation without compensation and fair and equitable treatment; *MTD v. Chile* (2004), assessment of the effect of a local entity's decision was carried out in accordance with the international standard of fair and equitable treatment; *Occidental v. Ecuador* (2004), the effect of this principle was evaluated and its consideration was carried out in accordance with the standards of fair and equitable treatment and full protection and security; and *Telenor v. Hungary* (2006), indirect reference was made to this principle of legitimate expectations.

- This current investor-state treaty arbitration practice, and in particular international regulatory disputes are giving rise to some political, international and academic concerns and questions from various sectors. Consequently, these concerns and questions are compromising the legitimacy of the current

international investment arbitration system itself. These concerns are related to the assessment which is carried out on a host state's domestic public policy and public law matters such as regulatory issues at this international level, and also in the determination of the state's international responsibility for the exercise of its public authority. This practice is restricting the free exercise of the sovereign power of the state to adopt new regulations and policies in favour of its national welfare.

The various concerns are based principally on the limitation of the sovereign exercise of state regulatory power, which is a consequence of multiple *heterogeneous* arbitral awards and their interpretations on the principles of international investment law, particularly through their application of the FET standard. This practice, apart from resulting in different decisions on matters of the same legal nature (public law and regulatory matters), is contradictory in terms of arbitral awards outcomes.

Despite the express selection by contracting parties of an applicable law to a dispute arising from a BIT, investment arbitrators seem to favour the application of principles of international (investment) law to the investor-state treaty dispute in order to determine the applicable law. This practice shows disregard for the express selection of a law, which not only ignores the will of the parties, but also overlooks the potential application of some other sources of law, such as municipal principles of law (that have given origin to the regulatory conduct of the host state) to international regulatory disputes. Thus, it becomes relevant to determine whether or not international (investment) law and domestic (constitutional and administrative) law are completely



disconnected from each other, especially taking into account their common public law origin and objective which is to control the regulatory conduct of the state and to protect private individuals.

This arbitral practice has given rise to particular situations which have caught state attention. This is due to various reasons, for example it has been said that investment arbitrators have (i) ruled on the legality of state domestic conduct; (ii) evaluated the fairness of governmental decision-making; (iii) determined the appropriate scope and content of property rights; and (iv) allocated risks and costs between business and society.<sup>1</sup>

Consequently, this arbitral practice has also obliged states to take governmental actions and/or measures to review BIT terms and conditions, or to even terminate them due to the following main reasons: (i) the argued unconstitutionality and illegality of some BITs in accordance with national law; (ii) the bias nature of some ICSID tribunals in favour of foreign investors; (iii) the high costs of arbitration facilities; (iv) the abuse of the legal personality principle by some foreign investors, in order to gain access to a particular BIT's provisions; (v) the conflict regarding the future BIT programme and the public interest of the state; (vi) the requirement of more regulatory and policy space; (vii) the exclusive jurisdiction belonging to the national courts to resolve foreign investment matters; (viii) the misuse of ISTA to challenge public-interest measures; (ix) the restricted access to ISTA; (x) the granting of equal legal rights to foreign businesses and domestic businesses; (xi) the concern about the wide definition of 'direct foreign investment'; (xii) the vague

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<sup>1</sup> See G. Van Harten, and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, EJIL (2006) Vol. 17 No. 1, 121-150, on page 147.

language of some BITs; (xiii) the conflict between private interests and the regulatory tasks of public authorities; (xiv) the risk of adopting new legislation which may breach the ‘fair and equitable’ international standard; (xv) the necessity of not only protecting foreign investors, but also guaranteeing the state’s right to adopt new legislation and policies; (xvi) the need of defining – in a clear manner– the international investment law standards; and (xvii) the suggestion of primarily applying municipal law to the regulation of ISTA.

The current arbitral practice is, without a doubt, creating a conflict of interests between foreign investors and host states, which is also affecting the legitimacy of this arbitral system. This increases the necessity of finding a balanced relationship between the state’s regulatory power and investment protection. In this regard, one of the temporary solutions to the problem in this arbitration system is the joint consideration of or reference to some of the principles of domestic (constitutional and administrative) law, together with international law principles when resolving international regulatory disputes. The fact that domestic (constitutional and administrative) law, international investment law and the law in general are not static and are constantly evolving to adapt the constant changes of any democratic society should obviously be taken into consideration. Ultimately, account should be taken of the fact that states are guarantors of national welfare, as well as guardians ensuring the protection of private individuals.

### **c. Conclusions**

Given the analogy between the public law functions of the investor-state treaty arbitration mechanism and the domestic legal remedies, it can be said that both have

been designed to mainly resolve regulatory disputes between the state and private individuals. Both parallel levels of state regulatory review have also been designed to protect private individuals from the unlawful or arbitrary conduct of the host state. In this context, it can also be said that this arbitration system has mainly been designed as a temporary forum to provide private individuals with a special tool to challenge the domestic rights and privileges of the host state at the international level. This particular point shows, amongst other aspects, that investment arbitrators are arbitrators of law rather than arbitrators of equity since they are required to assess the domestic regulation of the host state in accordance with the applicable law chosen by the BIT's contracting parties in order to determine the state's international responsibility.

Nonetheless, the problem is that the current evaluation of domestic regulatory conduct and public law matters of the host state is mainly being taken in accordance with principles of international (investment) law. Thus, principles of domestic (administrative) law and more than seventy-five years of experience on domestic state-private-individual-relationships are not being sufficiently considered by investment tribunals due to the application of the well-known international principle which asserts that a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The application of this principle is a variation of the principle contained in the Vienna Convention on the Law of the Treaties which is applicable to traditional subjects of public international law, i.e., sovereign states. It should be stressed that the treaty-based relationship between a host state and a given foreign investor is mainly a regulatory relationship. This is largely due to the lack of bargaining power private individuals have to conclude treaties and to the freedom of the state to adopt new policies and

regulations. Based on the treaty-based regulatory relationship between a host state and a foreign investor and on the analogous nature between ISTA and domestic administrative review institutions, the question now becomes: which principles of law should be applied by investment arbitrators to an international regulatory dispute between a state and a private individual?

In this respect, the autonomy of the contracting parties plays an important role as, frequently, the contracting (sovereign) states will establish the law applicable to a possible regulatory dispute in advance. Many contracting states do this through the body of a BIT or in default, they leave it to the ICSID Convention or UNCITRAL rules. The general rule is that the parties agree on application of the law of the contracting state party to the dispute, i.e., the host state's law (*lex situs*) in conjunction with the applicable provisions of international law. However, it must be noted that these applicable law provisions do not expand upon what sources of law should or should not be applied to the treaty-based dispute. BIT provisions, ICSID Convention and UNCITRAL rules only make reference to the law of the contracting state party to the dispute which leaves the relevant sources of law to be determined by a particular international investment tribunal.

As mentioned in Chapter IV, in determining the applicable law to an investor/state regulatory dispute, investment arbitrators have been recently starting to look for and rely on non- international rules and principles to carry out this entrusted task. These non- international sources have been mainly found in, and taken from, domestic legal sources such as legislative and administrative acts, i.e., the domestic regulation of the host state. In this regard, it has been said that '[t]he most fertile, but underutilised, source of principles for developing coherent conceptions of investment protection

standards are general principles of law recognised in municipal legal systems'.<sup>2</sup> It is important to draw attention to the fact that in many arbitral proceedings, the most popular and traditional practice of resorting to these domestic acts has been through the opinion of legal experts and affidavits.

Nevertheless, through recent arbitral awards, some investment tribunals and some arbitrators have already started to expressly recognise or point out the necessity of resolving investor/state regulatory disputes by resorting to domestic law and domestic law principles, particularly when applying the FET standard. This necessity has been mainly based on the fact that there is a lack of rules governing the unilateral acts of states in international law and is also due to the fact both customary international law and international investment law are both constantly evolving as is the (administrative) law of any democratic society.

Furthermore, it can be asserted that neither a BIT nor the ICSID nor the UNCINTRAL rules impede or prevent investment arbitrators from applying some principles of domestic (administrative) law belonging to a host state that essentially form part of the host state's natural law when dealing with regulatory disputes. A guideline on what domestic (administrative) law principles should be applied to a certain investor-state regulatory dispute does not exist in international law. Hence, this task is left to international arbitrators as was mentioned in Chapters IV and VI.

This suggested practice of referring to domestic (administrative) law principles as 'a margin of appreciation standard of review'<sup>3</sup> can help investment arbitrators in their

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<sup>2</sup> See Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, UK, 2009), on pages 69-72, on page 89.

<sup>3</sup> See W. Burke-White, and A. Von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 720.

difficult task of assessing the regulatory conduct of a state at the international level. This is particularly so if account is taken of the fact that the unilateral powers of the states have not yet been codified at the international level and ‘[i]nternational law is insufficiently mature compared to domestic legal systems’.<sup>4</sup> Furthermore, it has been asserted that ‘the integrity of the law of the host state is also a critical part of development and a concern of international investment law’.<sup>5</sup> It therefore seems that reference by investment arbitrators to administrative law principles may help to mitigate the risk of considering the regulatory conduct of the host state as a potential international breach of an IIT provision. Finally, this suggested practice may also help to prevent public law adjudicators from relying on their own subjective opinion too much.<sup>6</sup>

The fact that administrative law rights have been recently included within the definition of foreign investment also demonstrates the increasing importance that administrative law principles have in the growing investment arbitration system as an international mechanism to protect the subjective rights of the private individuals involved.

However, the suggested practice of referring to domestic administrative law principles means that the arbitral assessment of the regulatory conduct of the state is carried out in accordance with standards and principles which have not yet been fully developed. In particular, the fact that ‘the law itself is not a body of rules, but a stream of authoritative decisions’ is taken into account.<sup>7</sup>

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<sup>4</sup> C. B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction* 41 Vand. J. Transnat'l L. 1083 (2008), on page 1119.

<sup>5</sup> *Fraport v. Philippines* (Preliminary Objections), paragraph 402, quoted by Douglas, *supra* note 2, on page 72.

<sup>6</sup> See Douglas, *supra* note 2, on page 90.

<sup>7</sup> See A. M. Slaughter, and S. R. Ratner, *The Method is the Message* 36 Stud. Transnat'l Legal Pol'y 239 (2004), on page 244.

Despite the minor negative aspect related to the undefined scope of the principles, it can be stated that the exercise of resorting to domestic administrative law principles could at least provide a worldwide feeling that the rights and legal traditions of states and their juridical frameworks are being carefully considered in this arbitral system. This may therefore serve to strike a fair balance between states and investors. This fair balance can also mitigate the criticism surrounding the legitimacy of the international investment arbitration system.

One of the problems with the current investment arbitral practice seems to be the application of a very restricted decision-making method (known as the strict ‘no other means available’ standard<sup>8</sup>) to consider (jointly or separately) the different sources of law. Thus, it is true to state that a restricted decision-making approach has been adopted, but it is also true to state that neither national nor international laws prohibit any arbitrator from resorting to those municipal or international mechanisms or sources of law when dealing with regulatory disputes. This latter proposal can facilitate the task investment arbitrators have, of administering justice.

Due to the lack of any prohibition in applying such principles, this research encourages international arbitrators to resort or refer to sources of law such as the principles of domestic (administrative) law in international regulatory disputes as a way to impart justice in a fair, transparent and equitable manner. In particular, if it is taken into account that ‘the *sui generis* character of international law is an increased reliance on existing domestic legal systems for development of substantive international law’.<sup>9</sup>

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<sup>8</sup> See Burke-White and Von Staden, *supra* note 3, on page 695.

<sup>9</sup> See Picker, *supra* note 4, on page 1092.

The reluctance of investment arbitrators to refer to this particular source of law can be regarded in the long term as a contribution to the current crisis of legitimacy that the international investment arbitration system is facing. Vivid examples supporting the existence of this crisis are found in the recent withdrawal of some Latin American countries from the ICSID Convention, as well as the revision, renegotiation or termination of some BITs by various (developed and developing) states.

Taking all these factors into account, it could be said that now is the right time to initiate the practice of referring to these sets of domestic (administrative) law principles in international regulatory disputes due to the current concerns and questions surrounding the current arbitral system. There is a common intention, within the international arena, to achieve the right balance between the interests of foreign investors and the regulatory power of the host state. As already mentioned, the temporary solution to this legitimacy crisis is the consolidation of these two groups of interests by allowing reference to be made to some principles of domestic (constitutional and administrative) law in conjunction with principles of international law within international investment arbitration practice. Nevertheless, it must be emphasized that the application (separately or jointly) of international and national laws is not an easy task due to the reality that the law is not static, this therefore means that there is constant changes in both laws.

Recently, it has been emphasized that ‘there is little in international law that is permanent’.<sup>10</sup> Thus, it is recommended that international law and national law must be read and interpreted in an evolutionary manner in order to accommodate the application of domestic (administrative) law principles to give room to a state’s (i.e., IIA’s

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<sup>10</sup> Picker, *supra* note 4, on page 1097.



contracting parties) natural law with regards to the adoption of administrative actions. Furthermore, it can generally be affirmed that this exercise will bring a certain level of transparency and fairness to the currently criticized legal mechanism.

Finally, the problem with the domestic administrative law institutions and ISTA is that both parallel levels which carry out the review of the regulatory power of the state are operating in a disconnected manner. Nonetheless, the proposed temporary solution to this problem can be found in the common ground between these two (parallel) levels of review which is based on their similar methodology used to resolve a dispute between the state and the private individual, i.e., the case law methodology.

Moreover, it could be said that principles of international investment law are also principles of administrative law but at the international level. In fact, the content of the some principles of international investment law are drafted in BITs in a wider and more generic manner. Consequently, it may possibly be assumed that these international principles, such as the FET standard, could be usurping typical areas belonging to the traditional principles of domestic (administrative) law, but also other elemental precepts of municipal law in general. Once again, the solution to this regulatory problem is the consolidation of these sets of principles which belong to the same branch of law, i.e., public law. This exercise can also be achieved as a result of the increased cooperation between these two (parallel) (national and international) levels which will in turn lead to a more harmonious existence between national and international laws principles.

#### **d. Main contribution of this research to existing knowledge**

The present research was structured on the argued analogy between ISTA as a mechanism to deal with regulatory disputes and domestic administrative law (Chapters

I and II). This study went further to examine whether this analogy was certain and viable. During the execution of this thesis, it was established that some principles of domestic administrative law were applicable to this analogy.

Based on the scarcity of scholarly literature on this topic in the international investment arbitration world, the author decided to study the analogy from the perspective of the two most important legal traditions of the Western world, e.g., the British administrative legal system and the French administrative legal system (Chapter II). This particular and detailed approach, taken in an attempt to evaluate the current investor-state treaty arbitration mechanism (particularly, international regulatory disputes), has not previously been carried out.

These legal systems were selected for this study due to their irrefutable prestige around the world and the unquestionable influence that they have had on some other countries including their former colonies. Under these two legal systems, there are administrative law institutions and principles that are common to both systems, which are intended to resolve regulatory disputes between the state and private individuals in procedures such as administrative reviews and judicial reviews.

One of the main differences between these two domestic mechanisms (administrative and judicial review) and the international mechanism (arbitration), is that the former mechanisms have existed within the legal systems of many countries for more than seventy-five years on average, e.g., these domestic mechanisms have existed for over one hundred years in the French administrative legal system and over fifty years in the British administrative legal system. During these periods, a considerable number of legal principles have been developed domestically. Many of these legal principles are similar in their scope and meaning under both legal systems. These principles are: the

principle of legality; the principle of the administration's discretionary power; the principle of proportionality; the principle of legal certainty and legitimate expectations; the principle of equality before the law; the principles of the public administration's good faith; and, the principle of the duty to give reasons. All of these principles have been domestically developed with the intention of controlling the regulatory power of the state and its unilateral prerogatives (Chapter II).

However, in the international arena, through the international investment arbitration system, another set of principles have emerged and have been developed for the same purpose of mainly controlling the regulatory power of the state, but this time at the international level. These principles are mainly known as fair and equitable treatment; national treatment; most-favoured-nation treatment; full protection and security; access to justice, fair procedure and denial of justice; transfer of funds; and expropriation. (Chapter III).

Under the current arbitral practice, it has been demonstrated that the domestic regulatory power of the host state has been evaluated by investment arbitrators largely in accordance with these international sets of principles such as FET standard (chapter V). Thus, although the domestic regulatory power of the state is being assessed at the international level, many principles of domestic (administrative) law are not being afforded significant consideration, despite the fact that these domestic law principles have given grounds for the regulatory behaviour of the host state.

Consequently, after considering and highlighting the most relevant public law elements of the investor-state treaty arbitration mechanism (Chapters III and IV), this research suggests that international investment arbitrators should resort to or make reference to sources of law such as principles of domestic (administrative) law as a way to impart

justice in a fair, transparent and equitable manner when resolving international regulatory disputes. In fact, it has been found through this research that neither BIT, ICSID nor UNCITRAL rules impede investment arbitrators from adopting this particular proposal, unless a stabilization clause has been previously introduced by the contracting states in order to freeze the regulatory power of the host state for a certain period of time. This latter point can give grounds for further discussion but it goes beyond the scope of this research.

The proposal suggested in this research will not only serve to fulfil what is an arbitral need which has originated from the legitimacy crisis surrounding this investor-state arbitration system (Chapter VI), but the proposal has been formulated in a manner to overcome something which is *a legal taboo* in the international arena, i.e., the reference to domestic administrative law principles in international regulatory disputes.

Finally, in the existing scholarly literature, there is a gap which exists due to the lack of a set of guidelines which attempt to resolve the unilateral power of the state at the international level and the unbalanced relationship between states and foreign investors. Hence, this research contributes to the academic debate by way of a coherent and consistent analysis of this gap. In fact, the body of this research has served to illustrate that this gap in literature has been rapidly acquiring an increasing level of importance within the public law realm, most notably since 2000. The proposal made throughout this research can be viewed to be as a fair way to achieve a balanced relationship between the state's regulatory power and foreign investment interests.

#### **e. Limitations**

Throughout the development of this research, a number of limitations were identified. These limitations were limitations of form and some were limitations of substance. For

example, the present study is restricted due to the limits established by the University regulation, i.e., the limit of 100,000 words to present a comprehensive thesis discussing a large and complex topic such as the topic of this research. Additionally, time also constrained the author in producing a deeper and more detailed analysis of this topic as over three or four years of investigation would be required to produce a fully comprehensive thesis.

On the other hand, there were some limitations of substance that precluded a deeper discussion of the topic of this research. This is due to the fact that both the scope of domestic administrative law principles and the scope of international investment law principles are significantly wide and would require more than one doctoral thesis in order to ascertain their respective limits. Similarly, the apparent interconnection between these sets of principles, at a national and international level, also represents an additional challenge which would require further time and space to be addressed in a detailed manner. Thus, it can be said that many of the ideas and observations expressed throughout this study run the risk of being considered over-generalized or over-simplified by any public law lawyer.

Overall, this thesis mainly refers to the current arbitral practice (with particular emphasis on regulatory disputes) and arbitral awards which can be framed within the scope of some principles of domestic administrative law. Most significantly, this thesis introduces a proposal which is the exercise of resorting to these domestic principles in international regulatory disputes as alternative way of imparting justice at the international level. However, the great number of arbitral awards renders it impossible to examine every single award in relation to their application or non-application of domestic administrative law principles.

Thus, it is crucial to emphasize that the present research should not be taken, under any circumstance, as a detailed study of each principle of domestic administrative law or each principle of international investment law. Furthermore, this research is not a study concerning the coexistence between principles of domestic administrative law and principles of international investment law.

Finally, due to the diversity and vast number of national court decisions and investment tribunal awards, as well as the uncodified nature of administrative law, it was not possible to carry out a deeper analysis on the interaction between these two sets of domestic and international principles of public law.

#### **f. Further research**

The main objective of this study was to identify those common institutions and principles of domestic administrative law which can be applied to ISTAs (as mechanisms that largely deal with regulatory disputes) due to their argued similarity with domestic administrative mechanisms. In accomplishing this objective many other topics became relevant.

Some of these topics require further research into their academic importance along with determining their significance to the investment arbitration system. This exercise could consequently help to address the main topic of this research. For example, research on the coexistence between each principle of domestic administrative law and each principle of international investment law would significantly contribute to a greater understanding of this research. Similarly, the further analysis of arbitral awards, their use of domestic administrative law principles and international investment law principles would produce a considerable contribution to this study. Another interesting

area of enquiry which would add to the main scope of this thesis is the possibility of applying domestic (constitutional and administrative) law principles to the prescribed FET standard.

Lastly, other related areas may also require some attention, such as the further clarification of some arbitral matters, including: the limitation of arbitration for *public order* reasons (nationalization and legal reserve); establishing international investment arbitration as a real friendly mechanism to solve disputes; the development and future of the international investment arbitration system (will this system be consolidated in the future?); the current arbitral interpretation of international investment principles and the risk of considering them as a tacit stabilization clauses; etc.

#### **g. Final reflection**

The idea of this research was not only to provide the readers of this thesis with an introduction to a contemporary emerging public-law concern; but also to ignite the interest of the reader to undertake complementary studies.

Additionally, this thesis should also invite the readers and public law adjudicators to take into consideration the coexistence of public law and public policy as a way of guaranteeing an adequate level of ‘good governance’.

Thus, it is of crucial importance to highlight that despite the legal maxim of *ubi jus, ibi remedium* (i.e. where there is a right, there must be a remedy), the main task of any public law adjudicator is ‘setting standards of good governance’;<sup>11</sup> by using their judicial discretion.<sup>12</sup> Furthermore, it must be taken into consideration that ‘the basic

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<sup>11</sup> Jean Rivero, quoted by L. Neville Brown and J. Bell, *French Administrative Law* (Fifth Edition, Oxford University Press, UK 2003), on page 288.

<sup>12</sup> See A. W. Bradley, and K. D. Ewing, *Constitutional and Administrative Law* (Fourteenth Edition, Pearson Longman, England 2007), on page 726.

purpose of administrative adjudication is to protect the interests of individuals without unduly hindering the promotion of social goals'.<sup>13</sup>

Finally, perhaps, the task of setting good standards of governance may overlap with theories belonging to the political and social sciences, due to the fact that the civil servants who are in charge of applying the law could apply it in a way that pursues a different objective than the one for which the law was conceived.

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<sup>13</sup> See P. Cane, Administrative Tribunals and Adjudication (Hart Publishing, Oxford and Portland, Oregon, 2009), on page 13.



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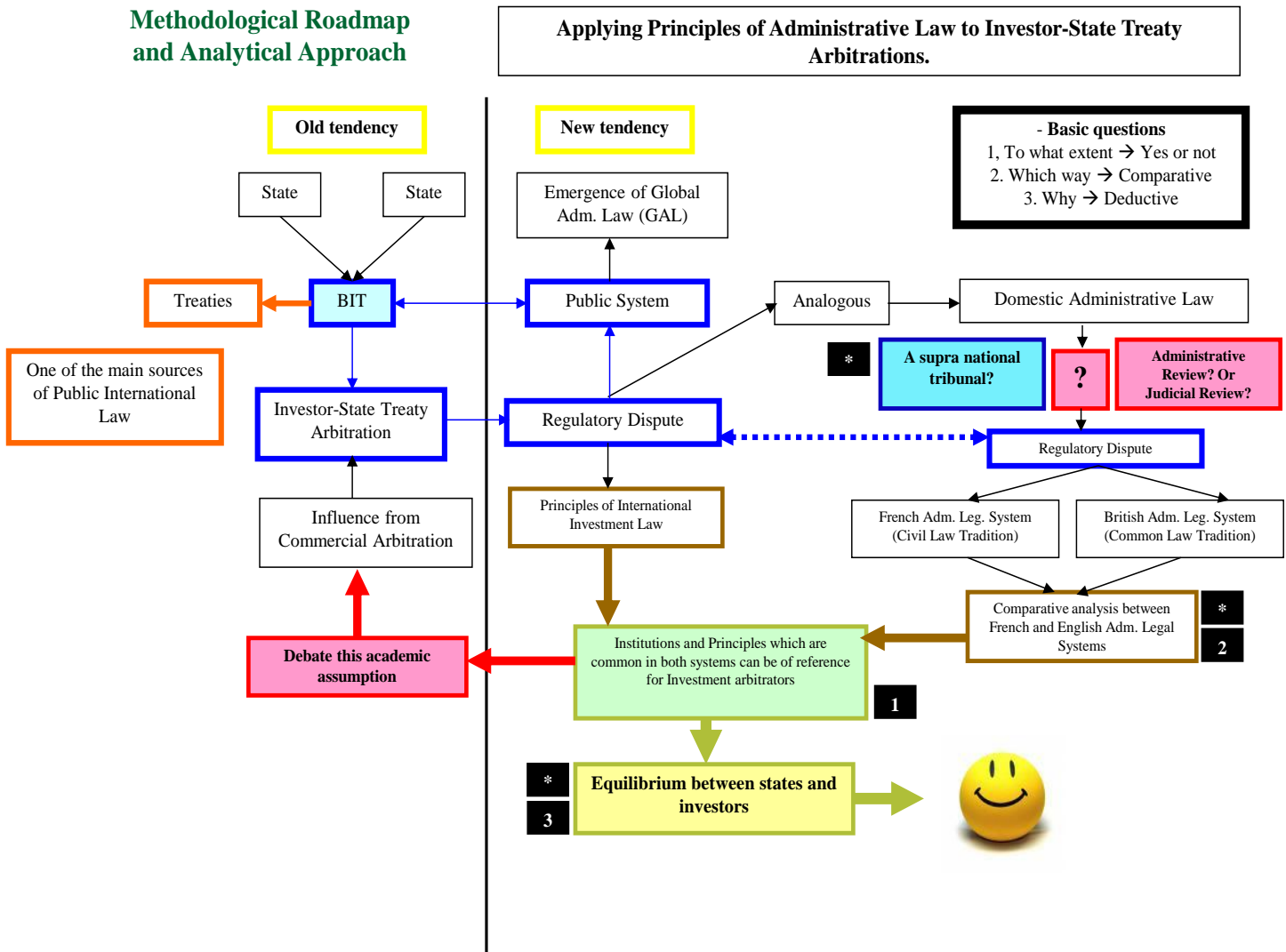
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Annex A

METHODOLOGICAL ROADMAP  
AND ANALYTICAL APPROACH





## Annex B

## Analogies of ISTAs with Institutions of Administrative Law

Characteristic	ISTA	Adm. Review	Jud. Review
Court-like basis	Yes	Yes	Yes
Three judge members	Yes	Yes	Yes/No
Private individual/state disputes	Yes	Yes	Yes
Use of adversarial system	Yes	Yes	Yes/No (Inq)
Protection against abusive/unlawful state conduct	Yes	Yes	Yes
Quasi-judicial functions	Yes	Yes	No
Creation by acts of state/parliament	Yes	Yes	Yes
Public law legal nature	Yes	Yes	Yes
Law is not static	Yes	Yes	Yes
Use of case-law methodology	Yes	Yes	Yes
Lack of self-enforcement	Yes	Yes	No
Part of the state's apparatus of justice	Yes	Yes	Yes

## Annex C

## Common principles of Administrative Law

- Principle of legality
- Principle of the public administration's discretionary power
- Principle of proportionality
- Principle of legal certainty and legitimate expectations
- Principle of equality before the law
- Principle of the public administration's good faith
- Principle of the duty to give reasons (motivation)

## Annex D

## Equilibrium between states and investors

### States

- Principle of legality
- Principle of the public administration's discretionary power
- Principle of proportionality
- Principle of legal certainty and legitimate expectations
- Principle of equality before the law
- Principle of the public administration's good faith
- Principle of the duty to give reasons (motivation)

### Investors

- Fair and Equitable Treatment
- National Treatment
- Most-favoured-nation Treatment
- Full Protection and Security
- Access to justice, fair procedure, and denial of justice
- Transfer of funds
- Expropriation